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Restoring Free Exercise Protections by Limiting Them: Preventing a Repeat of Smith

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INTRODUCTION

A. *SMITH*:[1] DESCRIPTION AND EFFECT

By the end of 1989, constitutional analysts felt secure in their understanding of the Free Exercise Clause. In simplest terms, its evolved meaning was that religious practices were not to be excessively burdened, save for a state interest of compelling force. Against this presumed background a new case was argued, one which seemed at first to be merely a new but minor elaboration on the well-settled unemployment compensation cases, which began with *Sherbert v. Verner*.[2]

In that case, Adell Sherbert, a Seventh-Day Adventist, refused a new work schedule which required her to work on Saturday, her Sabbath. Because no compromise seemed possible, she left her job and applied for unemployment compensation. These benefits were initially denied to her "on the ground that the state supplied unemployment benefits for people for whom work was unavailable, not for people who were unavailable for work."[3] The Supreme Court overturned this decision, however, reasoning that to judge whether a state action infringed on the Free Exercise guarantees, the court must ask (a) has religious practice been burdened; (b) did the

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This Article is dedicated to the memory of my late partner, Jorge M. Vásconez. The more time that goes by, the more I realize what I lost. Many individuals contributed to the supportive environment which made this article possible. I am particularly grateful to Prof. Kirsten Engel. Special acknowledgment is also due to Ed Anderson, a reliable and welcome presence for well over a decade.

1. Employment Div., Department of Human Resources of Oregon v. Smith, 494 U.S. 972 (1990).

2. 374 U.S. 398 (1963).

3. RONALD B. FLOWERS, THAT GODLESS COURT: SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS 30 (1994).

state have a compelling state interest in placing the burden; and (c) did no other means exist to achieve the state's legitimate goal?[4]

When arguments were made for *Employment Division, Department of Human Resources of Oregon v. Smith,*[5] both sides expected the outcome to be determined by the *Sherbert* test. Like *Sherbert*, this case involved the denial of unemployment benefits, this time to two members of the Native American Church, Alfred Smith and Galen Black. They had been fired from their jobs as drug counselors after participating in a religious ritual which included the ingestion of peyote, a criminally proscribed drug in Oregon.[6] Smith and Black were denied unemployment benefits because the reasons for their discharge were grounded in "work-related misconduct" which involved the breaking of criminal law.[7] It seems worthwhile to keep in mind that Smith and Black were not asking for their jobs back; that is, they were not contesting the right of the counseling center to fire them. Instead, all they desired was that their religious practices not bar them from receiving governmental aid in the form of unemployment benefits, even if those practices involved actions which were technically illegal.[8]

The question was whether the First Amendment protections for religious exercise extended to exempt these men from criminal laws that were not specifically directed against the peyote rituals of the Native American Church, and were otherwise generally applicable. Both parties had assumed that the compelling interest test was the standard to be met, and had limited their arguments to the issue of whether Oregon had a compelling interest in the exception-less enforcement of its drug laws.

The decision handed down in the spring of 1990 shocked, stunned, and even enraged the nation. First, it denied that the compelling interest test was applicable in most Free Exercise contexts. *Smith* thus broke with procedural precedent by not first soliciting new briefs and arguments after the Court had determined that it wished "to reconsider important issues not briefed by the parties."[9] The Court "fundamentally changed the law of free exercise without briefs or arguments, in an abstract case created by the Court."[10]

Where once states could interfere with religious observances for only the most pressing reasons, now, according to *Smith*, states had free reign

4. Sherbert v. Verner, 374 U.S. 398, 403-409 (1963).
5. 494 U.S. 872 (1990).
6. *Id.* at 874.
7. *Id.*
8. *Id.* at 875.
9. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 36.
10. *Id.*

only so long as they did not directly target religions. Religions, however, were due no special protections or exemptions from otherwise generally applicable laws.

Everyone seems agreed on what this decision did: now that "federal courts cannot protect the exercise of religion from formally neutral and generally applicable laws," the practical outcome has been that "[m]any judges, bureaucrats, and activists have taken *Smith* as a signal that the Free Exercise Clause is largely repealed, and that the needs of religious minorities are no longer entitled to any consideration."[11] Even those concerned to defend *Smith*'s "rejection of constitutionally compelled free exercise exemptions" wish to do so "without defending *Smith* itself," which is "neither persuasive nor well-crafted."[12]

So visceral has been the response, that Congress passed the Religious Freedom Restoration Act ("RFRA"),[13] which again requires that govern-

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11. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993(1) BYU L. REV. 221, 225; *See also* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39(1) VILL. L. REV. 1, 7 (1994): "Strictly applied, the *Smith* rule destroys most constitutional protection of religious practice;" and FLOWERS, *supra* note 3, at 35. "The effect of *Smith* was essentially to declare the Free Exercise Clause null and void." *Id.*

Although *Smith* itself speaks of generally applicable *criminal* laws, "lower federal courts have applied the decision to free exercise cases involving *any* across-the-board, neutral law; they make no distinction between criminal and civil laws." James J. Musial, *Free Exercise in the 90s: In the Wake of* Employment Div., Dep't of Human Resources v. Smith, 4 TEMP. POL. & CIV. RTS. L. REV. 15, 29 (1994)(emphasis added); *see also* Matthew S. Steffey, *The Establishment Clause and the Lessons of Context*, 26 RUTGERS L.J. 775, 787 n.45 (1995).

12. William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991). For instance, Michael W. McConnell points out that "[t]he primary affirmative precedent marshalled by the Court to support its decision consists *entirely* of overruled and minority positions." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1125 (1990).

13. Pub. L. No. 103-141, 107 Stat. 1488 (1993). Although presented as a return to pre-*Smith* standards, especially as articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963), there is some argument about whether such a presentation is historically accurate. Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 447 (1994). Further arguments for RFRA's unconstitutionality can be found in *Smith v. Fair Employment & Hous. Comm'n*, 51 Cal. Rptr. 2d 700, 722 (1996) (Mosk, J., concurring). The Supreme Court has recently agreed to hear a case involving a church in Boerne, Texas. Boerne, Texas v. Flores, No. 95-2074, argued Feb. 19, 1997, 65 U.S.L.W. 3627 (Mar 18, 1997). It wants to expand and renovate its building, but the city objects that that would ruin an historical monument. The case will determine the constitutionality of RFRA. My guess: RFRA will be judged unconstitutional. This article proceeds under the assumption that Smith, not RFRA, will be setting, for the long term, the tone and standard in Free Exercise law.

mental actions burden religious exercise only if they further a compelling interest and are the least restrictive means to further those interests.

A reasonable question is how such a decision as *Smith* came to be written. To assert that religious exercise has no constitutional guarantees or protections (excepting the rare instance when religious practices are specifically targeted)[14] certainly contradicts most Americans' understanding of the First Amendment. Part of the emotional reaction to *Smith* seems to be that it took most constitutional scholars by surprise, even if, in retrospect, it ought not. We may perhaps more effectively address the issues raised by *Smith* if we better understand its intellectual genealogy. So, where did *Smith* come from?

I. WHENCE *SMITH*?

A. JUSTICE SCALIA AND CHRISTIAN PREFERENCE

Unless one is willing to suppose that the justices function with large measures of sheer caprice, *Smith* must be the outcome of some logical (in the structural sense of being internally consistent, not necessarily in the valuational sense of being reasonable) line of thought. Most critics are agreed that the *stated* justifications within the opinion are shallow attempts to rationalize an outcome rendered necessary by other, unstated motivations. "When a decision is dubious or demonstrably wrong as a matter of text, precedent, and original intent, it must be based on something else."[15] What is *Smith*'s "something else"?

One possibility suggests itself in the identity of *Smith*'s author, Justice Scalia. Reading *Smith,* as well as his dissents in *Lee v. Weisman*[16] and *Edwards v. Aguillard,*[17] one could easily conclude that Scalia is not at all interested in protecting equally the religious rights of every citizen.[18]

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14. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

15. Laycock, *Remnants, supra* note 9, at 3.

16. 112 S. Ct. 2649 (1992).

17. 482 U.S. 578 (1987).

18. In trying to make sense of Smith, and by inference of Scalia's understanding of religious liberty, it does not help that he directly contradicts himself. He writes here that the Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 878-879 (1990). Yet just over a year earlier he himself summarized the unemployment compensation cases (e.g., *Sherbert, Thomas, and Hobbie*) as the Court's holding "that the Free Exercise Clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws." Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 38

Instead, he is concerned at all points that majoritarian Christian theism should be accommodated.[19] By contrast, minority theistic expressions, or even non-theistic religious outlooks, are to be *tolerated*, but only so long as such toleration does not greatly inconvenience the aforementioned majority.[20] Thus, Scalia has no problem with psychologically coercing high school students to acquiesce to prayers at graduation ceremonies.[21] The Christian majority has been conducting such services for many years, and somehow a tradition of religious domination eventually becomes a right to religiously dominate. Scalia joined in Justice Kennedy's opinion that any "test for implementing the protections of the Establishment Clause [and presumably also the Free Exercise Clause] that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."[22]

(1989) (Scalia, J., dissenting).

If his statement in *Texas Monthly* is correct, then *Smith* overrules all of the unemployment compensation cases. In fact *Smith* preserves these cases by making ad hoc distinctions, such as its convenient discovery of the "hybrid" constitutional condition. If he regards the statement as wrong, and he should refute it lest it mislead others.

In any case, it is Scalia's inconsistencies, and willingness to reinterpret not merely the Constitution, but also history, which has introduced "a new strain of irrationality in our Religion Clause jurisprudence." *Texas Monthly*, 489 U.S. 1, 45.

19. Scalia would seemingly draw support for his preferential treatment of Christianity from Prof. Jesse H. Choper. Choper believes that psychological ostracism is insufficient to trigger constitutional notice, and that the state display of dominant religious symbols sends a message "to religious minorities [that] is in [no] meaningful way as hurtful and offensive as [a similar display of racial preference] is to racial minorities." JESSIE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 101 (1995). Thus, while "favoring the dominant racial group should be (and is) almost always invalid, . . . assisting mainstream religious groups need not be forbidden." *Id.* at 102. Indeed, the "legislative advantage for mainstream religions should be permitted." *Id.* at 103. This casual discarding of the Establishment Clause is only one symptom of Choper's peculiarly unfortunate reading of the text.

20. Carl Esbeck draws a similar distinction between "right of conscience" and "toleration."

> [T]olerance holds that the origin of religious rights is the state's grace. The right of conscience, in contrast, is an assertion that individuals owe an allegiance to some higher authority that is prior to the duty of citizens to obey the state. The right of conscience thereby implies a limited state.

Carl Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?* 70 NOTRE DAME L. REV. 581, 623 (1995). Scalia seemingly holds mainstream Christians to be entitled to a right of conscience, while all others to tolerance only.

21. *See* Lee v. Weisman, 112 S. Ct. 2649, 2679 (1992).

22. County of Allegheny v. ACLU, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part). Earlier the same superiority of traditional practice over

On the other hand, governmental construction of a road through sacred Indian lands should not be impeded, even though everyone agrees that the need for such a road is far from compelling, and that such construction will effectively destroy the religion.[23] These long-standing traditional religious practices are *not* to be preserved. When the most pallid and perfunctory of Christian rituals is inconvenienced, Scalia literally seethes with frothy self-righteousness which is nowhere displayed when a non-Christian religion is threatened with extinction.[24]

Scalia does not intend to foster an actual governmental neutrality toward religion. Instead, he professes an extremely controversial opinion that government has an "interest in fostering respect for religion generally."[25] But apparently religions are not entitled to this respect on an equal basis. His words suggest that he sympathizes with those who lament Christian theism's fall "from a preferred position within the religion clauses, [to one where it] has been relegated to the level of all other belief sys-

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constitutional principle was used to permit the use of tax funds to provide legislative chaplains. Marsh v. Chambers, 463 U.S. 783 (1983). In a concurring opinion to *County of Allegheny*, Justice O'Connor responded to Kennedy's claim with the following:

> Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender-based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment. As we recognized in *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 678 (1970): "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."

492 U.S. at 630. It is unclear how *Marsh* could have ended in the result that it did if O'Connor's view were commonly accepted.

23. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

24. Verna C. Sánchez, *Whose God Is It Anyway? The Supreme Court, the Orishas, and Grandfather Peyote*, 28 SUFFOLK U. L. REV. 39, 60 (1994):

> The assumption that in the United States "there is a single voice making this affirmation [of being a Christian nation]," permitted the *Smith* Court to uphold a law which so directly affected a fundamental belief and practice of a non-Christian religion, and dismiss it as merely incidental. Justice Scalia's reasoning in *Smith* made it clear that he sees no cause for concern in this matter.

25. Lee v. Weisman, 112 S. Ct. 2649, 2682 (1992) (Scalia, J., dissenting). Neutrality would imply that religions are free to thrive or wither without governmental intervention; "fostering respect," on the other hand, suggests that government has an interest in assuring the continuity of religion, and that if survival requires governmental intervention, there should be no hesitation. Scott Idleman shares this yen for a religiously proactive government. Scott Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 264 (1994).

tems."[26] *Smith* abandons religious exercise to the vagaries of the political process; exemptions to generally applicable laws, while no longer enjoying constitutional imprimatur, may be doled out piecemeal by the legislature. Yet there seems to be an inherent contradiction in believing both that legislative bodies cannot be trusted to avoid directly targeting unpopular

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26. John W. Whitehead & John Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH L. REV. 1, 15 (1978). Justice Kennedy sarcastically expresses a similar conclusion in *County of Allegheny v. ACLU*, 492 U.S. 573, 677 (1989) (Kennedy, J., concurring) ("Those religions enjoying the largest following must be consigned to the status of least favored faiths so as to avoid any possible risk of offending members of minority religions.") Like Scalia, Whitehead and Conlan believe that the teaching of evolution has been the undoing of American society. *Id.*

The belief that Christianity should hold a special place within American political life is intimately related to the view that American society has a special role to play in Christianity. This view, often labeled "civil religion" after the writings of sociologist Robert N. Bellah, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL (2d ed., 1992), consists of a generic Christianity which regards the United States of America as the new Jerusalem, the biblical "city on the hill" intended to shine as a beacon to all righteous men. America is the special tool to work the will of God in this world.

So closely are America and God entwined, however, that civil religion easily transforms into nationalism, which holds the state to be the supreme value, with God becoming merely an instrument thereof. The Supreme Court has often espoused nationalist views, as it did in *United States v. Macintosh*, 283 U.S. 605 (1931). In that case, a resident alien was denied naturalization because he refused to swear to take up arms and defend the United States unless he felt the cause to be moral. The implication of the decision was that there is no higher authority than the state to which loyalty is owed:

> When he speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident . . . that he means to make *his own interpretation* of the will of God the decisive test which shall conclude the government and stay its hands. We are a Christian people. . . . But, also, we are a Nation with a duty to survive; a Nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.

Id. at 625. Although Flowers suggests that *Macintosh* was "the last time the Court ever articulated the Christian nation heresy" that the "will of the State is essentially equivalent with the will of God." FLOWERS, *supra* note 3, at 55, 56. McConnell, however, intimates that *Smith* smacks of this same "heresy." McConnell, *supra* note 12, at 1152. Nationalism in this sense — the state as supreme entity — probably motivates recent efforts to constitutionally forbid desecration of the state's symbolic embodiment, the flag."

Legal scholars often fail to preserve the technical distinction between civil religion and nationalism, as evidenced by the following claim: "Professing and practicing religion out of civic convention. . . can soon drift into the corruption known as civil religion, where culture and nationalism go hand-in-hand with spirituality." Esbeck, *supra* note 20, at 627.

religions, as was done in Florida to Santeria,[27] and also that these same bodies can be relied upon to be sensitive to the requirements of minority religions. On the contrary, the legislative history of RFRA explicitly doubts the reliability of legislative bodies to protect minority religions.[28]

Even Scalia recognizes that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[29] History has already shown us what treatment disfavored religions, such as Mormonism[30] and Jehovah's Witnesses,[31] can expect from popularly elected legislative bodies. But as this penalty will not be imposed upon his own mainstream Christian theism, this is a price Scalia is willing (for others) to pay: such inequalities are a regrettable but "unavoidable consequence of democratic government."[32]

If indeed one's goal were to restore mainstream Christianity to a privileged status, one could do no better than *Smith*. By arguing for a standard of strict neutrality, *Smith* effects a *de facto* preference for majoritarian Christianity, which can expect never to be seriously inconvenienced by elected bodies.[33] Other religious forms will fail to secure either

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27. Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 113 S. Ct. 2217 (1993).

28. Smith v. Fair Employment and Hous. Comm'n, 51 Cal. Rptr. 2d 700, 732 (1996) (Kennard, J., concurring in part and dissenting in part).

29. Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 890 (1990).

30. FLOWERS, *supra* note 3, at 20-21; Keith Jaasma, *The Religious Freedom Restoration Act: Responding to* Smith*; Reconsidering* Reynolds, 17 WHITTIER L. REV. 211 (1995).

31. FLOWERS, *supra* note 3, at 21-27.

32. Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 890 (1990).

33. *Cf.* Lee v. Weisman, 112 S. Ct. 2649, 2677 (1992) (Souter, J., concurring):

> By definition, secular rules of general application are drawn from the nonadherent's vantage and, consequently, fail to take such practices into account. Yet when enforcement of such rules cuts across religious sensibilities, as it often does, it puts those affected to the choice of taking sides between God and government. In such circumstances, accommodating religion reveals nothing beyond a recognition that general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not atall.

The distinction Souter here draws between secular and religious applies equally as well to that between majority and minority religions. *See also* Laycock, *Remnants, supra* note 9, at 15; Michael W. McConnell, *Neutrality under the Religion Clauses,* 81 NW. U. L. REV. 146, 152-153 (1986).

Some partisans are completely unembarrassed to assert that majority religious preferences should be imposed upon the minority. For instance, Doug Jones, a Southern Baptist minister, was angry at Lisa Herdahl because she objected to her children being subjected to obligatory Christian prayer over the loudspeakers each school day:

> Now are we a democracy? Does the majority rule? Or is it because one

consideration of their needs when laws are crafted, or discretionary exemptions from generally applicable laws.

At best, this dissection of possible motivations could explain only Scalia's agenda, leaving us uninformed about how he persuaded the majority to side with him.

B. THE *SMITH* MAJORITY AND CIVIL ANARCHY

For the Justices in the majority other than Scalia, the rationale behind *Smith* must surely lie elsewhere than in an agenda to privilege mainstream Christianity over all other religious forms. Moreover, we would expect it to be urgently persuasive. When surrendering religious practices to the whimsies of legislatures and inescapably subjugating them to generally applicable laws, the majority cannot have been ignorant of the fact that "formally neutral, generally applicable laws — the kind that raise no constitutional issue after *Smith* — were central to three of the worst episodes of religious persecution in our history."[34] Surely no minor or pedantic concern, then, would suffice for the majority to abandon religious protections to an environment which has perpetrated shameful oppressions in the past, with no assurance that these episodes will not be reenacted in the future.

The key to the majority's concerns lies perhaps in the following statement:

> If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded . . . . Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of almost every conceivable religious preference," and precisely because

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> person is offended that we're — as the majority, we've got to step aside and say, 'We're going to let Miss Herdahl have her way and we're going to let anybody else have their way'? Lesley [Stahl, the news reporter], that's not fair. That's not American.

60 Minutes: Lisa Herdahl v. Pontotoc County, (CBS television broadcast, August 13, 1995) (transcript). Most thinkers would argue that the majority riding roughshod over the minority on religious matters is most emphatically *not* the American way, and that the function of the Constitution is to prevent religious leaders such as Jones from using popular sentiment if not the vote to establish their religion.

34. Laycock, *RFRA*, *supra* note 11, at 223.

> we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.[35]

In fact, this is a legitimate worry: Scrupulous application of the *Sherbert* test does court anarchy.

This danger was not always present. Where once "religion" was synonymous with "Protestant Christianity," that is no longer the case. The definitional scope of "religion" is now far broader than was originally the case. This expanded inclusiveness can result in severe difficulties in attempting to apply fairly the First Amendment's free exercise protections. *Sherbert* preceded the decisions which gave new breadth to the term by several years. It is conceivable that, had Sherbert brought her case after 1970, by which time "religion" had been broadly construed, the outcome — or at least the terms of the "*Sherbert* test" — might have been different.

Because religion is presumed to constitutionally afford extraordinary protections, its proper definition and identification is an ongoing conundrum. The Supreme Court, in early decisions such as *Reynolds v. United States*[36] and *Davis v. Beason*,[37] established an initial requirement that legally recognized religions contained a necessary element of belief in supernatural entities. *United States v. Ballard*[38] later stipulated that the belief at issue be a *sincere* belief as opposed to one lightly professed.

Supernaturalisms were removed as a necessary feature of a sincerely held religious belief by a series of conscientious objector cases which culminated in *United States v. Seeger*[39] and *Welsh v. United States.*[40] The cumulative effect of the *Seeger* and *Welsh* decisions was to characterize religious belief not as having a specific, theistic content, but instead as fulfilling a unique psychological function for the individual. Often referred to as being an "ultimate concern" for the person, a religious belief is that for which the adherent would often prefer martyrdom rather than transgress.

Effective fulfillment of the religious function is thus a process which can operate on *any* specific content. Practically *anything*, in other words,

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35. *Smith*, 494 U.S. at 888 (citations omitted).

36. 98 U.S. 145 (1878) (rejecting the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice).

37. 133 U.S. 333 (1890) (holding that a man could lose his right to vote for belonging to an organization which advocates the practice of bigamy).

38. 322 U.S. 78 (1944).

39. 380 U.S. 163 (1965).

40. 398 U.S. 333 (1970).

can have attached to it religious attitudes by at least some persons. Even golfing can function religiously in some contexts.[41]

If anything can be religious, and if government is constitutionally forbidden from lightly burdening religion through a "compelling interest" test, then *any* governmental action can potentially infringe upon *someone's* religious beliefs, and *every* governmental action certainly does religiously offend at least a few.[42] Unquestionably, all exemption claims under the Free Exercise claim could not possibly be granted, leading some to believe that "if we cannot exempt every minority faith, we should not exempt any;" "even-handed repression" is to be preferred to "imperfect liberty."[43]

Even if, in principle, one were willing to sort through all claims to find those which should be respected, the process itself could so overburden the system as to cause its collapse. Even assuming compelling state interest supersedes most such claims, the way is open for every pronouncement to be challenged in lengthy court actions.[44]

In the environment confronting the *Smith* Court, efficient legislative process — that is, the smooth movement from enactment to implementation — could easily become stultified by the requirement of an intermediate step of judicial challenge. Unless something changed, *Smith*'s worries about civil anarchy — first voiced over a century ago in *Reynolds v. United States*[45]

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41. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 98 (1973). *See also* Bette Evans, *Contradictory Demands on the First Amendment Religion Clauses: Having It Both Ways*, 30 J. CHURCH & STATE 463, 469 (1988): ("If religion is defined by the function of the belief system rather than by its content, then any ultimate system of values should qualify for First Amendment protection. By this characterization, one whose ultimate set of personal values is music, football, or the Democratic party might well have a legitimate religious claim.")

42. The "Government cannot help but offend the 'religious needs and desires' of some citizens." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 469 (Brennan, J., dissenting) (1988).

43. Laycock, *Remnants*, *supra* note 9, at 14 (summarizing the view of Justice Stevens).

44. From this perspective, Justice O'Connor's concurring opinion in Smith offers cold comfort. Disagreeing with the reasoning of the majority opinion, if not in its outcome, she believes that the compelling interest test should be retained. However, "Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a *case-by-case determination* of the question, sensitive to the facts of *each particular claim*," Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring) (emphasis added). She expresses a similar sentiment in *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984). The burden this standard would place upon an already over-taxed judiciary would overwhelm the system. Some method must be found to limit the cases which require such close scrutiny, while preserving the essentials of religious freedoms. The goal of this essay is to propose such defensible limitations.

45. 98 U.S. 145, 166-67 (1879): "Laws are made for the government of actions, and

— would not be unwarranted.[46] Clearly an unsavory collision was about to transpire: It "is unlikely that an extremely broad definition of religion will be permitted to coexist with an extremely generous protection of the claims that fall within that definition."[47]

Three solutions would avoid the calamity, but each carries its own price. First, the definition of religion could be scaled back so that once again it was limited to simple theisms. This solution would not remove all problems, but would restrict the class of potential challenges so that the application of a compelling interest test would not paralyze government. Yet the present functional standard for identifying religion is not the result of legal whimsy. Because other disciplines (such as anthropology) operating independently have converged toward this same understanding,[48] the conclusion is sound and reasonable. Moreover, its withdrawal would introduce anew the set of problems which necessitated its formulation in the first place. For instance, under a strict theistic standard, Buddhism is not a religion, and Disneyland, because of its attention to supernatural entities, might qualify as a church.[49]

The class is truly as broad as the functional definition requires. The problem is therefore not how religion is defined; the present legal definition is intellectually correct and reasonable. Some other way must be found to limit the claim for religious exemptions. Unless the Court is prepared to perpetuate an intellectual fiction,[50] the solution to our problem must be

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while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself."

46. Ellis West notes this problem, and suggests that the question then hinges on "whether the Court can draw the line in any sort of fair and principled manner." Such guidelines are presently lacking, but West feels that any judicial attempts to decide "who is eligible for exemptions will inevitably [be] arbitrary, unpredictable, and discriminatory." Ellis West, *The Case Against a Right Religion-Based Exemptions*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 591, 604-605 (1990). The objective of this essay is to prove West wrong, i.e., that rational limits can be identified.

47. CHOPER, SECURING RELIGIOUS LIBERTY, *supra* note 19, at 63.

48. James M. Donovan, *God Is as God Does: Law, Anthropology, and the Definition of Religion*, 6 SETON HALL CONST. L.J. 23 (1995). An exhaustive scrutiny of the problem of anthropological definition of religion is available at James M. Donovan, Defining Religion: Death and Anxiety in an Afro-Brazilian Cult (1994) (unpublished Ph.D. dissertion, Tulane University) (on file with author).

49. Donovan, *supra* note 48, at 84.

50. Governmental entities have, of course, never been shy about perpetrating intellectual fictions. For instance, the Indiana General Assembly "came close to enacting a bill that mandated the value of π (pi) to be 4." Constance Matts, *A Baker's Half Dozen Pieces of Indianapolis Trivia*, AMERICAN ASSOC. L. LIBR. NEWSL., June 1996, at 385. But

sought elsewhere other than in re-instituting what is now recognized to be an indefensible theistic definition.

A second possible escape is the one selected by Smith. If the legitimately defined scope of religion cannot be brought into contact with a legitimate compelling governmental interest test without risking anarchy, and if both are to be individually preserved within their proper contexts, then the solution is to *not bring them into contact.* Thus, *Smith* ruled that religious exercise claims (against generally applicable laws) are not subject to the compelling interest test.

Frankly, this is the lazy strategy. It does admittedly solve that particular problem, but at enormous cost, in this case the withdrawal of constitutional Free Exercise rights from minority religious practitioners. Any subsequent work after *Smith* the Court intended to be done by the legislatures, decreeing on a case-by-case basis who would or would not be exempt from generally applicable laws.

The third and final resolution is one which the courts may be forced to employ in any event, now that RFRA has tossed this hot potato back into their hands. It seeks to find preexisting grounds for limiting the scope of Free Exercise challenges. This would allow such challenges to continue to succeed where our social tradition believes that they should,[51] but does not invite such numbers of challenges as to undermine the entire system.

C. OUTLINE OF PRINCIPLES TO LIMIT FREE EXERCISE CHALLENGES

Five such criteria for limiting Free Exercise challenges will be offered. All will be examined in detail below; for presentation's sake, however, they are briefly introduced here.

The legal definition of religion, reviewed above, received valuable corroboration from the social sciences. Their discussions on religion do not end there, and the first two limiting principles have their roots in anthropological and sociological conclusions about the nature and structure of religion. First, organizations and groups have a weaker claim to Free Exercise protections than do individuals. Second, these protections extend necessarily only to central religious beliefs, and exclude peripheral or ancillary beliefs.

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these efforts come at great cost of institutional prestige, if nothing else.

51. For instance, Catholics should have a clear and unambiguous right to celebrate the Mass. Should prohibition again become the law, under *Smith* they would have to earn a legislative dispensation to use wine for the Eucharist. On the contrary, even without such dispensation, almost everyone would agree that Catholics have a constitutional right to their Mass, *whatever* the winds of popular law-making.

The remaining three principles are almost certainly less controversial, and can be seen as arising from the internal axioms of law. Thus, Free Exercise protections do not extend to actions imposed on unwilling others, but are instead limited only to personal actions. The fourth principle is that Free Exercise challenges should fail where exemptions would raise Establishment concerns. And finally, the fifth and last limiting principle is that Free Exercise protections shield more strongly those who have new demands imposed upon them than those who willingly and knowingly move into situations which create the conflict.[52]

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52. This list of five is not intended to be exhaustive. We could easily include the feasible argument made by Michael McConnell that a Free Exercise accommodation would be:

> suspect if it requires officials who otherwise would exercise little discretion to make ad hoc judgments. . . . If, however, procedures already exist for case-by-case determinations of a subjective nature by responsible officials, or if the religious accommodation can be reduced to a simple objective rule that can be administered at the operational level, the dangers of arbitrariness are somewhat diminished.
>
> Under this new approach, the government's secular, programmatic interest in enforcing neutral standards without religious exceptions should be viewed in a new light. The court should consider not just the substantive impact of the accommodation, but also its procedural impact. When decisions must be made quickly, authoritatively, and evenhandedly by operational personnel [as in deciding to allow deviations from military uniform regulations], the government may be entitled to resist interposing requirements of religious accommodation. But when decisions already involve case-by-case, subjective considerations [as in unemployment benefit cases], there should be little procedural objection requiring the government to take religion into account as well.

McConnell, *Neutrality*, *supra* note 33, at 156. Interestingly, where McConnell sees the individualized review process as permitting a more generous environment for Free Exercise exemptions, Prof. Laycock's reading of *Smith* implies that this environment is one of the few remaining contexts in which strict scrutiny is still required:

> The Court does not explain why individualized assessment cases are to be treated differently, but the reason must be that individualized decision-making provides ample opportunity for discrimination against religion in general or unpopular faiths in particular. Courts cannot assume that an individualized decisionmaking process was religion-blind just because the underlying statute or legal principle is religion-blind.

Laycock, *Remnants*, *supra* note 9, at 48.

In a different work, McConnell proposes three additional limiting principles. They are:

> 1. "[G]overnmental interests do not extend to protecting the members of the religious community from the consequences of their religious choices;"
> 2. The "government is not required to create exemptions that would make religious believers better off relative to others than they would be in the absence of the government program to which they object;" and

The cumulative result, then, is that the Free Exercise Clause offers its strongest protections to personal, central beliefs and actions about personal conduct whose accommodation does not raise Establishment issues, and which are threatened by new governmental dictates. Least protected would be group peripheral beliefs and actions which impose demands upon unwilling others, whose accommodation raises Establishment issues, where the conflict arises from knowing movement from a context which did not present this tension into one that did.

II. FIVE LIMITING PRINCIPLES

A. PERSONS ARE BETTER PROTECTED THAN ORGANIZATIONS

1. *Rationale*

The first two limiting principles take advantage of the latest conclusions on religion by the relevant social sciences. In both cases, they go against general trends within the judicial sciences. But as those trends have ended in the *cul-de-sac* that is *Smith*, the present moment may be opportune to reevaluate these predispositions lest, as some fear, the entire process repeat itself.[53]

Specifically, legal interpretation should consider anew whether institutions have the same claim to Free Exercise exemptions as do individuals. Not that institutions should have *no* such claims, but rather the graded question of whether they should have identical, or even superior protections. If they do not, then here would be one major and defensible

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> 3. The "claims of minority religious should receive the same consideration under the Free Exercise Clause that the claims of mainstream religions receive in the political process. . . . To achieve equal rights of conscience, the courts should frame the free exercise inquiry as follows: Is the governmental interest so important that the government would impose a burden of this magnitude on the majority in order to achieve it?"

McConnell, *Free Exercise Revisionism, supra* note 12, at 1145-47. Only the second bears some relation to one of the five herein proposed.

53. Jaasma, *supra* note 30, at 226. In fact, this may be the second time through this cycle. Over a century ago, *Reynolds v. United States*, 98 U.S. 145 (1878), held that while there was complete freedom of religious *thought*, there was no constitutionally required protection for religious *action*. That decision's "overly restrictive view of the free exercise clause virtually read it out of the Constitution for over sixty years." Edwin B. Firmage, *Religion & the Law: The Mormon Experience in the Nineteenth Century*, 12 CARDOZO L. REV. 765, 780 (1991). Later jurisprudence later restored substantive meaning to the clause, which *Smith* has now again removed. Having happened twice again, apprehensions that it might happen a third time are not unfounded.

limitation to Free Exercise challenges which would avert the civil anarchy feared by the *Smith* majority.

The priority of personal religious liberty over corporate religious liberty has roots in both historical and current legal thought. For instance, Justice Brennan has claimed that "the values of the First Amendment . . . look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals."[54] James Madison, in his *Memorial and Remonstrance Against Religious Assessments*, opined that it "is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him."[55] Madison's suggestive use of the singular is echoed by the language of RFRA: "Government shall not substantially burden a *person's* exercise of religion."[56] Despite an established practice to read "person" to include corporate groups,[57] there is good ground to reject that reading in this case. The drafters of RFRA originally defined "person" to include corporate groups, but deleted this provision in subsequent versions.[58]

Indeed, some assert the proposed limit as an established principle of constitutional law. "In a body of commentary noted for persistent and many-sided discord, one conclusion is so widely shared that it can be called common ground: the Free Exercise Clause is a guarantee of *individual* religious liberty."[59] Others, however, are just as confident when they expand this claim, asserting that there "is near universal agreement on the starting point: the overarching purpose of the First Amendment is to secure religious freedom, for persons of faith or none, *and for religious organiza-*

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54. Braunfeld v. Brown, 366 U.S. 599, 610 (1961) (Brennan, J., concurring and dissenting).

55. FLOWERS, *supra* note 3, at 147. According to Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987), "nothing in the debates or early drafts of the religion clauses gives the slightest support to the concept of corporate free exercise exemptions. The exemption concern, to the extent it survived, was focused entirely on the possibility of conflict between secular obligation and individual religious conscience." *Id.* at 419.

56. Pub. L. No. 103-141, §3(a), 107 Stat. 1488 (1993) (emphasis added).

57. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 623 (1988) (Noonan, J., dissenting) ("Under our Constitution all corporations are persons").

58. Smith v. Fair Employment & Hous. Comm'n, 51 Cal. Rptr. 2d 700, 754 (1996) (Baxter, J., concurring and dissenting).

59. Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 6 TUL. L. REV. 335, 350 (1994) .

tions."[60] And finally, there are those who are willing to subordinate Free Exercise protections for individuals to those for groups.[61]

The assertion that individual religious liberty is more precious than institutional religious liberty derives from the unique nature of religion itself as compared to other cultural "institutions." For example, the economic system of a society is free-standing. Individual citizens may decide for themselves whether to participate, and to what extent. But the system is *inherently* economical, and all participatory acts within the system are also *unavoidably* of economic significance. Because the economic system has a legitimate "life" apart from the individual, it can be usefully reified and ascribed innate qualities and even rights which do not devolve from those of the individual. In other words, the economic system may in and of itself merit nurturance and protection beyond whatever nurturance and protection would be due to all of the individual participants within that system.

The religious "institution" is not of this nature at all. If it can be usefully said that societies have economic systems, it *cannot* be similarly said that they have religious systems. Religion is defined by a belief's placement within the *individual's* psychological structure; it is the statement of his or her "ultimate concern," and is at the pinnacle of the propositional hierarchy for that person.[62] This was the conclusion of the *Seeger* and

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60. Esbeck, *supra* note 20, at 592 (emphasis added). *See* FLOWERS, *supra* note 3, at 35.

61. *E.g.*, Esbeck, *supra* note 20, at 642:

> Structural pluralists argue vigorously for the legal rights of all groups, not just churches, even when that means lessening some individual rights so as to protect the autonomy of these mediating structures. This expansive view of associational rights, they argue, ultimately enhances individual freedom by challenging liberal political theory which postulates that all rights are held by the individual. Radical individualism leaves the citizenry defenseless in the face of the all too powerful state. If one is genuinely concerned about preserving human rights, there is more to fear from a state whose power is checked only by claims of personal autonomy than there is to fear from granting associations certain rights.

See Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99.

The Court errs, from the present perspective, by subordinating individual faith to institutional doctrine: "[I]t is the essence of religious faith that ecclesiastical decisions are reached and to be accepted as matters of faith." Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714 (1976). But this standard is *not* the "essence of religious faith," but rather the fundamental requirement for the stability and authority of any institution, whether governmental or religious.

62. If psychological structure is the defining feature of "religion," then it necessarily follows that only individuals and not groups can have "religion" (and thereby religious rights). Groups lack a mind and thus have no psychology of any kind, although being in

Welsh decisions by the Supreme Court. To transgress a religious belief is a unique *individual* harm which has no corporate parallel.[63]

Having gone that far, entailments necessarily follow. Groups and group activities are "religious" only to the extent that each individual recognizes them as such for him- or herself. *No social group or group activity is inherently religious*. At best, the form we would casually point to and identify as a culture's "religion" is only the modal religious form for persons within that culture.[64] Different settings will offer different concordance rates between available religious forms and actual individual religiosity, meaning that while sometimes knowledge of the modal religious

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groups can have particular effects upon the psychology of individuals. Only persons have a mind, despite frequent attempts to characterize society as a superorganic entity.

Similarly, Ira C. Lupu points out that the sincerity standard for religious belief also precludes organizations because "organizations cannot hold convictions or make spiritual commitments, and they cannot demonstrate the sincerity with which organizational positions are held. Recognizing organizational claims to free exercise exemptions from secular law thus tends to undermine the entire structure and legitimacy of free exercise law." Lupu, *Free Exercise Exemption, supra* note 55, at 423.

The proper locus of religion is thus the individual, and not society, although society plays an important role in buttressing the religious beliefs for the individual. Scalia ironically suggests that if religion were correctly understood, judicial interpretation would not be nearly so difficult, although the correct interpretation would not effect the result he desires.

> Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is *not* that, and has never been.

Lee v. Weisman, 112 S. Ct. 2649, 2685-2686 (1992) (Scalia, J., dissenting). He is wrong; religion is *only* that.

63. That is, it is possible to harm the individual without hurting the group, but there are no "group injuries" which are not reducible to injuries to the constituent individuals. Ironically, West clearly identifies this nonreciprocality, but claims that it argues *against* religion-based exemptions:

> [It] has been argued that religious persons experience a special kind of emotional harm or suffering when they obey laws that their religion commands them not to obey. This argument, however, cuts too narrowly because there are many truly religious activities whose abandonment, though seen as undesirable, would not cause "pangs of conscience." [This objection is addressed in the second proposed limiting principle of this essay.] Also, it would protect only individuals and not churches, because churches (institutions) do not have emotions, and their members do not share the same beliefs or emotions.

West, *supra* note 46, at 614-15.

64. The nature of religion, and its place within individual psychology and social structure, are reviewed and developed extensively in Donovan, *Defining Religion, supra* note 48.

form provides legitimate insight into a specific individual's religiosity, at other times the two bear no relationship to one another. Some traditional, nontechnological cultures probably have a very high overlap between the two; our own culture has a very low coincidence between public religious form and actual religiosity. Indeed, the Supreme Court depended on this very divergence when it classified some obvious transgressions against the Establishment Clause as being mere "ceremonial deism" and thus subject to the *de minimis* principle.[65]

Social forms are those which have been elaborated and provided for ready and easy use by the religious consumer, but which do not actually become "religious" until the forms are installed in the appropriate place within the individual's belief structure. Without such installation, even full and overt participation within the system will not necessarily mean that that system is an expression of that person's religion. External compliance does not signify internal commitment, and *only* the latter is relevant for identifying "religion." This fact required the development of Allport's distinction between "intrinsic" and "extrinsic" religiosities.[66]

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65. *Lex non curat de minimis*: The law does not bother with trifles. "The *de minimis* principle has some value, as Madison understood and as the Supreme Court occasionally has understood too; it has referred to 'ceremonial deism' as a way of sweeping under the rug theistic practices like the invocation 'God save this honorable Court' or 'In God We Trust.'" LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 176-77 (2nd ed., 1994). These religious references are deemed so meaningless that their acceptance cannot, to any reasonable man, signify any kind of genuinely religious attitude. They "have lost through rote repetition any significant religious content." Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

Some would argue that this final insignificance is the inevitable result of government's touch on religion, and should serve as warning to all those who would breach the wall between church and state.

> Ask the Supreme Court to endorse your Christian faith, and they will relegate the virgin-born Jesus, the only begotten of the Father, the King of Kings and Lord of Lords, to the company of Santa Claus, Frosty the Snowman and Alvin the Caroling Chipmunk.

FLOWERS, *supra* note 3, at 140 (quoting Russell H. Dilday, Jr., then president of Southwestern Baptist Theological Seminary, in a speech to the 1984 Southern Baptist Convention).

Milner S. Ball passes on the suggestion that the inability to view some demonstrations and symbols as retaining any genuine religious significance may have been behind Justice O'Connor's opinion in *Lynch*, a case which upheld the constitutionality of a city-supported crèche. Milner S. Ball, *Normal Religion in America*, 4 NOTRE DAME J. L. & PUB. POL'Y 397, 411 (1990)

66. Gordon W. Allport & J. Michael Ross, *Personal Religious Orientation and Prejudice*, 5 J. OF PERSONAL. & SOC. PSYCHOL. 432 (1966).

A person is said to have an extrinsic orientation when he or she participates in socially religious activities, but does so primarily for nonreligious benefits.

If this deconstruction of religion is valid, "religion" is formally restricted to individual belief and practices.[67] Free Exercise protections would most immediately extend to these individual claims. Aggregate or group practices would be protected only to the extent that they are *direct* expressions of individual religious belief. For instance, if the personal belief is that certain observances must be made in groups (as perhaps with the Catholic Mass), then these group activities would be protected coextensively with individual claims.

But many claims involve issues which accrue not from the religious beliefs of individuals, but rather from the qualitatively different nature of a corporate group. Relevant here would be tax-exemption issues, or exclusion from general employment regulations. Because these issues arise only at the group level, they are at least one step removed from that of the individual, where "religion" strictly applies with the full force of all that being "religious" implies. As such, *some* group claims do not qualify as being technically "religious," and these should enjoy a lesser share of Free Exercise protections.[68]

> Extrinsic values are always instrumental and utilitarian. Persons with this orientation may find religion useful in a variety of ways — to provide security and solace, sociability and distraction, status and self-justification. The embraced creed is lightly held or else selectively shaped to fit more primary needs.

Id. at 434. By contrast, intrinsic orientation connotes what most of us mean when we speak of a person as being "religious."

> Persons with [an intrinsic] orientation find their master motive in religion. Other needs, strong as they may be, are regarded as of less ultimate significance, and they are, so far as possible, brought into harmony with the religious beliefs and prescriptions. Having embraced a creed the individual endeavors to internalize it and follow it fully.

Id. The Supreme Court edged closer to this distinction when it required that beliefs seeking First Amendment protections should be "sincerely held." *United States v. Ballard*, 322 U.S. 78 (1944).

It would do no violence to the founders' intent, I conclude, to suggest that while intrinsically held religious beliefs merit the fullest accommodation by governmental bodies, extrinsically held beliefs deserve almost none. The *only* issue should be how to distinguish between the two, and not whether the distinction should be made. While this issue is related to the second limiting principle discussed herein, religious orientation has not been included here as a separate limiting principle, although fuller development of the theory may make such inclusion desirable.

67. McConnell, *Neutrality, supra* note 33, at 159, is thus incorrect when the author claims that "Religious experience typically is communal and institutional, not individualistic." The appropriation of religious symbols, rituals, and machinery to achieve "communal and institutional" ends should not obscure the fact that such symbols, rituals, and machinery evolved to serve religious ends primarily, and all other goals only secondarily.

68. Under the topic of "current events," we can consider possible ramifications of this

2. *Example*: Amos

This limiting principle would alter at least one outcome of recent jurisprudence. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,[69] Arthur Mayson had been employed by the Deseret Gymnasium, a nonprofit facility run by the Mormon Church. After sixteen years as building engineer, he was fired because "he failed to qualify for a temple recommend, that is, a certificate that he is a member of the Church and eligible to attend its temples."[70] Mayson contended that his discharge instanced a case of religious discrimination in violation of section 703 of the Civil Rights Act of 1964; the defendant Church, however, argued that section 702 exempted them from this prohibition. The argument thus became whether extending section 702 "to allow religious employers to discriminate on religious grounds in hiring for nonreligious jobs . . . violates the Establishment Clause."[71]

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principle. The Orthodox Jews were distressed by proposed USDA regulations to make meat and poultry safer. Certain of the criteria conflict with their practice of certifying kosher meats. They ask for a religious exemption. Michael Grunwald, *New USDA Regulations Threaten Kosher Tradition*, TIMES-PICAYUNE (New Orleans), August 3, 1995, at G16. Should they be given one?

Yes, but not necessarily on the basis of being a religious organization. *Any* processor should be allowed to deviate from the guidelines *so long as* their product is clearly labeled as not being in compliance with federal inspection standards. Obviously, any foodstuffs which are not served in their original packaging should be required to meet the guidelines. Otherwise, the consumer should have the choice and, if so wishing, take the risk. This solution assumes, perhaps unrealistically, that citizens are willing to assume responsibility for their own lives and choices.

69. 483 U.S. 327 (1987).

70. *Id.* at 330.

71. *Id.* at 331. Far less controversial is the exemption of religious bodies from prohibitions on religious discrimination in occupations which are clearly related to the practice and dissemination of doctrine. Thus, while the facts of *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), initially seem to parallel those of *Amos*, critical differences appear.

A teacher at a private, religiously operated elementary school, after becoming pregnant, failed to have her contract renewed because the sect had a belief that "mothers should stay home with their preschool age children." *Id.* at 623. She ultimately charged that she was a victim of sex discrimination; Dayton replied that the First Amendment shielded the school from such actions because the termination was the result of sincerely held religious beliefs.

Frederick Mark Gedicks mistakenly characterizes both these cases as involving "a religious group membership decision." Gedicks, *supra* note 61, at 105. Neither plaintiff is petitioning for admission into church membership; both are concerned only to keep their means of support. While the two are related, they are not identical, since "it does not necessarily follow from norms of associational freedom that organizations with autonomy over membership choices should have comparable autonomy over employment choices."

Justice Brennan clearly stated that Amos instanced "a confrontation between the rights of religious organization and those of individuals. Any exemption from Title VII's proscription on religious discrimination necessarily has the effect of burdening the religious liberty of prospective and current employees."[72] The limiting principle proposed here suggests that the conflict should be weighted in favor of Mayson. The Supreme Court saw it otherwise, and presumed that maximal flexibility should be granted the church and not the individual.[73]

Lupu, *supra* note 55, at 435-436. A case which genuinely touches on issues of religious group membership is *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

What distinguishes *Dayton* from *Amos* is the institutional role of the terminated person. In *Dayton*, the woman was employed as a teacher, and could therefore be reasonably expected to both disseminate and embody church doctrines to students. Earlier the Supreme Court summarized its conclusion that the "role of the teacher in fulfilling the mission of a church-operated school" . . . [is] . . . is "critical and unique." *NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979). The failure of the teacher in *Dayton* to conform to church doctrines would conceivably undermine their importance in the eyes of the children. In *Amos*, however, the man had no such role which entailed modeling behavior for emulation by the students, as he was employed principally for building maintenance. Since his duties did not extend to the indoctrination of religious doctrine, his failure to receive religious credentials reasonably undermined no one's perceptions of the credibility of those doctrines. Laycock's long list of (in his opinion) horrible impositions upon church autonomy fails to consider this distinction between personnel involved in roles to disseminate religious doctrine (priests, teachers, bishops, etc.) and those whose roles are wholly mundane, like janitors, cooks, or bus drivers. Laycock, *Remnants*, *supra* note 9, at 43. Necessary autonomy to discriminate for the one should not be extended to the other.

The parallel issue for tax-exemption cases is that of subsidiarity. If churches proper are exempted, how far from this core religious institution can the organization stray before it crosses over into clearly taxable endeavors? *See* Esbeck, *supra* note 20, at 640-41. Benefits granted to a church seminary need not necessarily be extended to cover, for example, a clothing store or travel agency operated by the same church. While these latter enterprises are of undeniable utility to the church, their regulation does not involve the government in entanglement with questions of religious doctrine. The lower court for *Amos* devoted admirable thought and energy to this question. *Amos v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 618 F. Supp. 1013 (D.C. Utah 1985).

Finally, the fact that *Amos* is technically an Establishment Clause case and not one of Free Exercise does not impact the particular arguments being made here. However, the Mormon Church did contend that the § 702 exemption was required by the Free Exercise Clause. The Court deigned not to take up this issue. The later *Smith*, of course, taught us that the Clause requires *no* exemptions.

72. *Amos*, 483 U.S. at 340 (Brennan, J., concurring).

73. This discounting of individual religious rights in favor of group rights is at odds with other Supreme Court statements. For instance, in *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985), the Court had "identified the *individual's* freedom of conscience as the central liberty

The Court, repeating the need for institutional autonomy, found no problem with the exemption.[74] However, the analysis offered above identifies the fatal flaw with the exemption in this case. The Court reached its result by applying the much-beleaguered *Lemon* test instead of that of strict scrutiny. Yet as *Amos* itself reiterates, "laws discriminating *among* religions are subject to strict scrutiny . . . and laws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon*."[75] But the Court has mistakenly characterized this exemption as not distinguishing among religions.

Legal scholarship has yet to fully come to terms with the functional definition of religion. Even when intellectually acknowledging that religions need not be theistic, authors still lapse into that assumption. For example, Idleman wonders that "it would be interesting to know on what *secular* basis Congress decided to protect religious practices but not analogous nonreligious practices."[76] But from a functional perspective, there *are no* "analogous" nonreligious practices, since if they are truly analogous, they are necessarily also religious.[77]

Amos reveals a similar lack of appreciation of what a functional definition requires. The issue is the scope of the exemption. As stated, the

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that unifies the various Clauses in the First Amendment." *Id.* (emphasis added). And at least one right — a Free Exercise claim to abortion — is unique to individuals and cannot be claimed by an organization. Harris v. McRae, 448 U.S. 297, 320-321 (1980). Given this conflict, we are not surprised to read Idleman's conclusion that *Amos* is a "relatively unreliable case." Idleman, *supra* note 25, at 291.

74. Esbeck, *supra* note 20, at 636-637. Autonomy issues are argued, for instance, in *Serbian Eastern Orthodox Diocese v. Milivojevich*,426 U.S. 696 (1976). Esbeck reads the deference extended by *Amos* to have been compromised by *Jimmy Swaggert Ministries v. Board of Equalization*, 493, U.S. 378 (1989), because it "subject[s] religious organizations to the same regulation and taxation as any business." *Id.* at 638. According to Laycock, this step away from complete autonomy of religious organizations portends horrible consequences. Laycock, *Remnants, supra* note 9, at 56. While Berg believes that employment exemptions should be given to religious organizations unless good reason can be found for their denial, the present argument here is that, for non-religious roles, the burden is on the organization to demonstrate its need for the exemption. Berg, *supra* note 11, at 39-40.

75. *Amos*, 483 U.S. at 339.

76. Idleman, *supra* note 25, at 286.

77. This is why the nonpreferentialist interpretation of the Religion Clauses is irrational. Its advocates, such as Scalia and Rehnquist, agree that the state cannot aid one religion over another, but argue that nothing prevents the state from aiding all religions equally. Levy articulates many of the weaknesses of this approach. One which he misses relates to the definitional scope of religion. LEVY, *supra* note 65.

If anything can be "religion," and if everything probably is religion to somebody, then even if the Constitution permitted nonpreferential treatment of religion in theory, it would be *impossible* in practice to be so evenhanded.

§ 702 exemption extends only to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[78] This specification is too narrow on two counts. First, Justice Brennan suggests that the exemption should apply across the board to all nonprofit organizations, not just to religions.[79]

More relevantly to our discussion, however, is whether its practical application equates "religion" with "church" or some clearly affiliated arm of a denominational body. Most obviously, religions without churches are excluded from this exemption from general laws against discrimination. The guarantees of personal religions — those with a congregation of one — established by *Frazee v. Illinois Department of Employment Security*[80] are effectively overridden.

Even if all churches are religious in the sense of the functional definition (which they are not, and thus the exemption is overinclusive from this perspective), institutions which serve religious functions for other citizens, but which are nontheistic and thus do not "look like" the typical church devoted to postulated supernatural entities, would be excluded. For example, within the religion of nationalism,[81] the political parties function analogously to theistic churches. Any exemption granted to a generic "religion" must extend to the Democratic and Republican National Committees, as well. Certainly the political parties are not serving religious functions for all of its members, but then neither are theistic churches, and on this dimension the two can be distinguished only in degree, and not by kind.

The exemption, however, certainly was not intended to extend as far as this. This means, however, that the "law discriminat[es] among religions," rather than "affording a uniform benefit to *all* religions," and thus the standard of strict scrutiny should apply rather than the more lenient

78. *Amos*, 483 U.S. at 329 n.1.

79. *Amos*, 483 U.S. at 345 (Brennan, J., concurring). His reasoning is as follows: He agrees with the present essay that "ideally, religious organizations should be able to discriminate on the basis of religion *only* with respect to religious activities." *Id.* at 343. Unfortunately, this would require judicial determination of religious versus secular activities, which would create "excessive entanglement" and "create the danger of chilling religious activity." *Id.* at 344. This risk is particularly grave with respect to *nonprofit* activities. He would thus extend the exemption to all nonprofit activities, ostensibly religious and not, and then preclude a case-by-case evaluation of the "religiousness" of any.

80. 489 U.S. 829 (1989).

81. *See supra* note 25 (brief description of the religion nationalism).

Lemon test. If the Mormon church succeeds under the latter, it may not do so under the former.

This result, however, would render section 702 unconstitutional in its entirety, and not simply as applied to personnel engaged in nonreligious activities. The present discussion would have no objection to a limited exemption pertaining to personnel functioning in recognized religious capacities. However, it remains to be seen whether it can be written so as to truly apply to *all* religions, and not just theistic religions with organized churches.

The first limiting principle, then, is an entailment of the very meaning of "religion." If "religion" derives its unique and identifying features from the individual, any attempt to preserve "religion" must likewise focus its attention on the individual. Organizations and groups may enjoy some reflected or derivative rights, but only because they partially dwell in the protective penumbra surrounding persons. Group religious rights are thus always subordinate to individual religious rights where the two conflict, and only individual religious rights are entitled to the full and unmitigated protections of the Free Exercise Clause.

B. CENTRAL BELIEFS ARE BETTER PROTECTED THAN PERIPHERAL BELIEFS

1. *Rationale*

Not all beliefs seeking shelter under the First Amendment are equal. First, the candidate belief must be "religious." The tone of *Smith* makes it clear that the high court is loathe to venture into the terrain of discriminating within and among religions. Still, its constitutional obligations require first that it distinguish religious beliefs from nonreligious beliefs.

Some argue that the cumulative effect of several Supreme Court rulings renders challenge to a claim of religiosity impermissible.[82] But frequently the lower courts agree it should be left to the judiciary to independently

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82. Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163, 191 (1977):

> If religion under law, according to the *Welsh* decision, involves nothing more than a "deeply and sincerely" held belief which may be "purely ethical or moral in source and content," and if under *Seeger* the inquiry must be limited to "whether the beliefs professed by a registrant are sincerely held and whether they are in his own scheme of things religious," and if *Ballard* mandates that "no inquiry can be made into the verity of beliefs," then under the combined holdings, presumably, the mere assertion by an individual that his beliefs are religious is the only *prima facie* evidence needed to substantiate the validity of the professed beliefs. What is held out to be a religious claim, therefore, cannot be challenged.

certify what is or is not religious. In *Malnak v. Yogi,*[83] Judge Adams states that "the question for the definition of religion for [F]irst [A]mendment purposes is one for the courts, and is not controlled by the subjective perceptions of the believers."[84] This case has the unique distinction of being "the first appellate court decision . . . that has concluded that a set of ideas constitutes a religion over the objection and protestations of secularity by those espousing those ideas."[85] In similar spirit, *Womens Services v. Thone*[86] concluded that "the mere labeling of something as coming within a 'religious' area by theologians does not serve to make that area 'religious' for purposes of invoking First Amendment protections."[87] The Supreme Court *perhaps* disagrees with that last statement — although freely expressing its preference not to be cornered into adjudicating such questions, it has also not yet ruled that personal labels of a belief as "religious" are beyond challenge — but it clearly agrees with its converse: Even if the court should not lightly contradict a claim of religiousness, it clearly can contradict one of nonreligiousness.[88]

Two other well-established precedents go a long way toward limiting Free Exercise challenges by distinguishing between types of beliefs. The professed belief must not be simply religious; it must also be *sincere*[89] *and specific.*[90] On the other hand, beliefs are *not* required to be shared by an

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83. 592 F.2d 197 (3d Cir. 1979).

84. *Id.* at 199.

85. *Id.* at 200.

86. 483 F. Supp. 1022 (D. Neb. 1979).

87. *Id.* at 1040.

88. *Welsh v. United States,* 398 U.S. 333, 341 (1970) provides:

> The Court's statement in *Seeger* that a registrant's characterization of his own belief as "religious" should carry great weight, 380 U.S. at 184, does not imply that his declaration that his views are nonreligious should be treated similarly. When a registrant states that his objections to war are "religious," that information is highly relevant to the question of the function his beliefs have in his life. But very few registrants are fully aware of the broad scope of the word "religious" as used in §6(j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption.

89. United States v. Ballard, 322 U.S. 78 (1944). A recent application of this standard is to be found in *Brown-El v. Harris,* 26 F.3d 68 (8th Cir. 1994). Although it does not refer to *Ballard,* it does invoke the sincerity standard. A Muslim inmate was removed from the list of those eligible for the special Ramadan fast meal schedule because he broke the fast of his own accord. The circuit court found no violation of his Free Exercise rights. By implication, the prison is not obligated to respect beliefs which the prisoner himself does not highly regard, that is, those which are held lightly and not sincerely. *Id.* at 69.

90. Jimmy Swaggert Ministries v. Board of Equalization, 493 U.S. 378. In this case, "the Court assumed that burdens on religion are of no constitutional significance unless they

organization, even one which the individual claims to belong to and which is the purported source of the belief.[91] Nor need they be "acceptable, logical, consistent, or comprehensible to others."[92]

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require the church or the believer to violate a particular doctrinal tenet." Laycock, *RFRA, supra* note 11, at 240; *cf.* Laycock, *Remnants, supra* note 9, at 23-24.

This conclusion may be seen as a logical extension of the normal presumption that "an individual asserting a constitutional claim must have suffered a personal, *concrete* injury that would be remediable by judicial process," Esbeck, *supra* note 20, at 587 n.19 (emphasis added). This change derived from the language of Article III of the U.S. Constitution. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 960 (1989). "[C]ourts are to refrain from 'abstract questions' which amount to 'generalized grievances' shared by many others. Esbeck, *supra* note 20, at 615 n.130. "Concrete" would lead one to expect that a specific governmental action must abut a specific (and specifiable) religious doctrine before a First Amendment claim would be warranted.

One case which invokes the principle of tenet specificity is *Riely v. Reno*, 860 F. Supp. 693 (D. Ariz. 1994). The Freedom of Access to Clinic Entrances Act of 1994 ("FACE") punishes those who interfere with a person's attempt to avail herself of health services by such actions as blocking easy egress and threatening the patient. Abortion protesters claimed that FACE violated their free religious exercise by not permitting them to engage in these harassing behaviors. However, the court ruled that the protesters "failed to allege that their religion advocates the use of force or threats of force or the use of physical obstruction to make passage to a facility unreasonably difficult or hazardous." *Riely*, 860 F. Supp. at 709.

The requirement that the religious belief be specific and specifiable is somewhat different from the issue that it be explicitly specified. The distinction is that, while the belief should be precise and articulable, there is question whether it need be compelled. The original author of RFRA "refrained from limiting the Act to actions which are 'compelled' or 'motivated' by religion, leaving to the courts the job of determining, on a case-by-case basis, whether or not a particular practice is indeed an exercise of religion. [He] also expressed his opinion that an activity merely 'permitted' by one's religion would not be entitled to protection under the RFRA." Jaasma, *supra* note 30, at 285 n.468. Clearly, if a hierarchy is to be developed, religiously compulsory behaviors are to be better protected than religiously optional ones.

91. Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829 (1989) (belief can be personal and not allied with an organization); Thomas v. Review Bd., 450 U.S. 707 (1981) (belief can deviate from those held by other members of the religious organization).

92. *Thomas*, 450 U.S. at 714. The effect of *Thomas* in practice would be to preserve the right of idiosyncratic belief systems to claim religious exemption, although the burden of proving the religious nature of those beliefs might be higher in those instances: "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection." *Id.* at 715. While seemingly a weakness, this interpretation is actually more generous than others proposed, including that of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which requires an organizational or historical dimension to a claim before it could be recognized as religious. This interpretive strategy could easily exclude altogether individual claims for religious protection.

Any particular religious belief is but one part of a larger religious system — or if the term "system" is precluded by the requirement that beliefs not be necessarily logical, at the very least a particular belief at issue is only one member of a collection of related beliefs. Not all parts/members of these systems/collections are of equal kind.

One social scientifically oriented approach partitions religious phenomena into four parts: Ethical Action, Worship, Faith, and Therapy.[93] Faith and Therapy should be absolutely protected by the free exercise clause, and the worship subsystem should also be protected so long as there is no demonstrable harm outside of the worship group or severe physical injury within it, and the ethical action subsystem should receive a much lesser degree of protection.[94]

By this standard, observing the Mass (if you are Catholic) and refusing medical care for one's self (if you are Christian Scientist) should never be infringed upon.[95] But snake-handling, because it is a worship feature which threatens "severe physical harm" within the group, may not be beyond the reach of legal action.[96]

Even less secure would be claims to discriminate against others, such as refusing to rent to a gay couple, since these are ethical actions. Ethics determines how man relates himself to other men; religion principally concerns itself with morality, which is how man responds to god. While ethics and morals are connected, they are not identical, and the protections for religious morals should not extend in their entirety to embrace ethics as well. This qualification is at the heart of the third proposed limiting principle, discussed below.

Even *Smith* recognizes gradations of religious behavior: "the practice of throwing rice at church weddings" ought not be protected to the same extent as is "the practice of getting married in church."[97] Yet the proposal here is to require the investigation into centrality which some suggest was rendered unconstitutional by *Smith*.[98]

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93. Joseph M. Dodge II, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679 (1969).

94. *Id.* at 697.

95. Refusing medical care to others, however, could well infringe upon the third limiting principle, discussed below. *See infra* subsection C and accompanying text.

96. This contradicts McConnell's proposition that governmental action should not extend to protecting people from the consequences of their religious choices. McConnell, *Neutrality*, *supra* note 32.

97. Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 887 n.4 (1990).

98. The "strongest reading of . . . *Smith* is that it may verge on unconstitutional for a court to inquire into the substantiality of an alleged burden on religious exercise." Idleman,

Explicitly, Free Exercise protections should be granted maximally to the central religious tenets of the individual. Derivative beliefs should enjoy some measure of deference by governmental bodies, but less so than the core doctrines.

Looking for the moment at conventional Christianity, there is a presumption that any belief or practice specified in the Apostle's Creed is intrinsic to the faith. Transgression upon or denial of any of these mandated tenets would not be a mere inconvenience, but would threaten the cult utterly. By any understanding of the terms, these tenets are "central" to the religion, and should be maximally protected.

On the other hand, most Christians have other beliefs which, while derived from, are not as central to the core religious convictions. Christmas trees are a common symbol of the religion, but nowhere are Christians enjoined as to their erection. Such derivative or motivated beliefs and practices would surely fare differently under judicial scrutiny than would the central religious tenets.[99] A law forbidding the practice — imagine a scenario wherein the environmental damage caused by the seasonal mass cutting and then, later, discarding of innumerable pine trees into already overtaxed landfills required a cessation of the use of live trees — such a law should stimulate only the mildest First Amendment objections.

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supra note 25, at 273-274. Since any deliberation about burden implies a weighing of relative importance, by implication the Court "suggested that the fundamental enterprise of examining and weighing the individual importance of religious claims [i.e., which are central and which are not] should not be part of the judicial decisionmaking process *at all*." *Id.*

99. This essay thus disagrees with Professor Laycock's characterization of noncentral beliefs:

> [F]or many believers, the attempt to distinguish what is required [or central] from what grows organically out of the religious experience is an utterly alien question, perhaps a nonsensical and unanswerable question, certainly a question that reflects failure to comprehend much of their faith and experience.

Laycock, *Remnants*, *supra* note 9, at 26. On the contrary, just as he expects judges to be able to constitutionally distinguish between the "soldier who believes he must cover his head before an omnipresent God . . . from a soldier who wants to wear a Budweiser gimme cap," (*id.* at 11), so too should the same judges be able to draw a line between observances of the Catholic Eucharist and Easter egg hunts.

In fact, the erection of Christmas trees has recently become the focus of a Free Exercise claim. Fire officials in a New Jersey township warned local clergy not to erect trees in their sanctuaries unless they were equipped with adequate sprinkler systems to combat possible blazes. An affronted Presbyterian minister charged that this restriction infringed his First Amendment protections. David Gibson, *W. Milford Sees Fire Hazard in Churches' Tradition*, THE RECORD (Northern New Jersey) Dec. 6, 1996, at A1. By the standards articulated here, such suits are trivial and should fail.

Legal commentators are divided among themselves over the centrality requirement. While most concede that it would be a very complex standard to apply, only some regard it as a desideratum.[100]

The limiting principle so baldly stated, we can now consider in detail *Smith*'s objections:

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100. The divergence in opinion among experts can be illustrated by the following excerpts:

> Distinguishing between various kinds of burdens on religion . . . can also reflect a justifiable effort to weight the strength of the religious interest, as well as the government interest, as part of the overall process of "balancing." It seems sensible to require stronger reasons to justify a severe effect on religious freedom, and less to justify a minor effect.
>
> Unfortunately, it is often difficult for courts to calibrate effects on religious practice, because an important part of that calculus — how important is the practice to the believer or church? — is essentially a theological question beyond the competence or authority of judges.

Berg, *supra* note 11, at 51-52. It may be noted that "competence" is altogether a different issue from "authority." Courts routinely rule on issues with which they have no direct competence. Science and technology questions are regularly considered, as are appraisals of mental health of defendants. When competence is an issue, courts normally rely upon expert testimony rather than ruling the matter to be outside the reach of law. Michael McConnell, *Free Exercise Revisionism, supra* note 12, at 1144, also goes on the "pro centrality" side.

Laycock, *Remnants, supra* note 9, at 32, shares Berg's pessimism that such a standard could be constructed, but differs in his view that even if it could, it should not be used:

> A threshold requirement of centrality would indeed be a mistake, both under-inclusive and unworkable. It would be under-inclusive because all religious practices are part of free exercise, and not just those the Court finds central. It would be unworkable because religious centrality is a continuous variable. It cannot be converted into a dichotomous variable, controlling a discontinuous leap from no protection at all to the compelling interest test, without producing distortion, error, and indefensible differences in result.

On the one hand, it can be seen here that Laycock is himself resorting to the sort of argument he ridiculed Justice Stevens for espousing, namely, that if we cannot guarantee flawless outcomes, the strategy should not be applied. "Even-handed repression" is to be preferred to "imperfect liberty." *Id.* at 14.

Both of Laycock's objections can be met if we accept his point that centrality is a continuum. Central beliefs are protected most and best, less central beliefs less so and less completely, but they are never without protections entirely. The standards for infringing on the first should be higher and tougher than those impinging upon the second. But since Laycock himself feels comfortable referring to some beliefs as "central," it seems reasonable to suppose that courtroom judges can do as much. *Id.* at 30.

Lupu, *Where Rights Begin, supra* note 90, at 959, is also against use of a centrality standard, as is CHOPER, SECURING RELIGIOUS LIBERTY, *supra* note 19, at 71.

> Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. [Citations omitted] It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." [Citation omitted] As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of a particular litigant's interpretations of those creeds.[101]

But that same case from the previous term, *Hernandez v. Commissioner,*[102] was cited by *Swaggert*[103] to support precisely the opposite point: "Our cases have established that '[t]he free exercise inquiry asks whether the government has placed a substantial burden on the observation of a *central* religious belief or practice.'"[104]

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101. Employment Div., Dept. of Human Resources, v. Smith, 494 U.S. 872, 886-887 (1990) (citation omitted).

The Court had earlier spoken against "centrality" tests in *Widmar v. Vincent,* 454 U.S. 263, 269-270 (1981), and in *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988). The expressed fear in the latter was that the Court might have to contradict claims to religious centrality, requiring it "to rule that some religious adherents misunderstand their own religious beliefs." *Id.* at 457-58. But *Welsh v. United States,* 398 U.S. 333, 341 (1970) (quoted *supra* note 88) has already established the precedent that the Supreme Court is free to interpret a person's religious beliefs even in ways that contradict that person's own characterization of those beliefs. In his dissent to *Lyng,* Justice Brennan speaks in favor of a showing of centrality. *Lyng,* 485 U.S. at 458-77.

102. 490 U.S. 680 (1989).

103. Jimmy Swaggert Ministries v. Board of Equalization, 493 U.S. 378 (1990).

104. Id. at 384 (emphasis added). This quotation actually refers to two limitations, that the belief be central, and that the burden be substantial. The two are not unrelated, since the centrality of a belief would necessarily be a variable to consider when estimating whether a burden is substantial. Separate consideration is not given herein to the concept of "substantial." Cases which discuss this topic include *Smith v. Fair Employment and Housing*

Despite the protestations of *Smith,* this type of "inquiry...is not without precedent."[105] *Wisconsin v. Yoder* is often cited in this context: Amish parents were exempted from compulsory school attendance laws for their children in part because a "life aloof from the world and its values is central to their faith."[106]

Lower courts, too, have been known to tread into precisely this allegedly forbidden territory. In *Northwest Indian Cemetery Protective Assn. v. Peterson,*[107] the Yurok, Karok, and Tolowa Indians objected to plans by the U.S. Forest Service for logging projects in the Blue Creek Unit, an area with religious significance for these peoples. At that time, the court ruled

> That the Indians use the Blue Creek high country area for religious purposes and consider the area sacred is not enough to characterize the contemplated Forest Service actions as a burden on free exercise rights. The Indians have to show that the area at issue is *indispensable and central* to their religious practices and beliefs.[108]

In other words, to secure the desired protections the tribes must demonstrate to the court's satisfaction that the beliefs and practices focusing on the Blue Creek area are more like the Mass than like Christmas trees.

Another case which seemed to apply a centrality test was *Brandon v. Board of Education.*[109] Students were not allowed to conduct prayer meetings in public school immediately before the school day commenced. The Second Circuit court of appeals held that such refusal did not breach the Free Exercise rights of the students.[110] Factoring into the court's decision was the purely voluntary nature of the prayer meeting. Because the worship was not religiously compelled, accommodation was not required. The outcome might have been otherwise had the court been faced with "a Moslem who must prostrate himself five times daily in the direction of Mecca."[111]

Commission, 51 Cal. Rptr. 2d 700, 714, 723 (1996); Idleman, *supra* note 25, at 265-274, also delves into the concept of the substantial burden, as does Lupu, *supra* note 90.

105. Sánchez, *supra* note 24, at 58.

106. 406 U.S. 205, 210 (1972).

107. 795 F.2d 688 (9th Cir. 1986).

108. *Id.* at 692 (emphasis added).

109. 635 F.2d 971 (1980).

110. *Id.* at 980. I would have decided this otherwise. Douglas Laycock also disagrees with this result, although he is a tad sarcastic in his tone. Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act,* 62 FORDHAM L. REV. 883, 893 (1994).

111. Brandon, 635 F.2d at 977.

What these cases demonstrate is that, whatever the objection to considering the "centrality" of a belief, it cannot be based on a claim that such has never been done. The proposal here is not to initiate a new inquiry, but rather only to require what courts at all levels have at times undertaken of their own initiative.

2. *Example*: Allegheny County

Can judges handle weighing the religious significance of a specific religious practice? The several cases cited above suggest that in principle, at least, courts are not completely reticent to tackle the problem. Ironically, the very source of strongest warning against the enterprise also provides one of the most explicit demonstrations of its practice.

The Supreme Court has discussed in surprising detail the place of Christmas trees in American religious life. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*,[112] resolved the well-known dispute over whether public display of crèches and menorahs at Christmas time constitutes an unconstitutional establishment. The court ruled that the crèche, displayed alone, framed by a floral arbor, and installed in the most significant architectural feature of the County Courthouse, did indeed constitute an illegal establishment of religion. On the other hand, the menorah in conjunction with a Christmas tree was not, since the conjunction of the two served only as a permissible governmental acknowledgment of the holiday season and its origins, without showing undue preference or endorsement.

In this context the religious significance of the Christmas tree is pivotal. If it is minimally religious or even purely secular in meaning, then the tree can serve to "dilute" the religious implications of the menorah. If, on the other hand, the Christmas tree is an important part of Christian religion, then its use with the Jewish symbol would be a case of multiple establishment, reinforcing rather than diluting the religious message. Three of the four opinions thus agonize over the place of Christmas trees within Christianity.

Justice Blackmun suggested that "[a]lthough Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas."[113] This view of the tree "serves to emphasize the secular component of the message communicated by other elements of an accompa-

112. 492 U.S. 573, 573-75 (1989).
113. *Id.* at 616.

nying holiday display, including the Chanukah menorah."[114] The display is thus constitutional.

Justice O'Connor also had no problem with the joint display. "[W]hatever its origins, [the Christmas tree] is not regarded as a religious symbol. . . . A Christmas tree displayed in front of city hall, in my view, cannot fairly be understood as conveying government endorsement of Christianity."[115]

Justice Brennan, however, is more skeptical. In his view, "this attempt to take the 'Christmas' out of the Christmas tree is unconvincing."[116] He aptly demonstrates that despite O'Connor's attempt to secularize the tree, her analysis actually presupposes its continued religious significance.[117] To him, the display is an obvious attempt at an unconstitutional establishment.

Christmas trees have their historical roots in pagan Europe, becoming incorporated into Christian practices beginning as recently as Medieval Germany.[118] Consequently, the tree is neither uniquely Christian (other religions use or used them), nor is it even thoroughly Christian (first millennia Christians would not recognize the practice). If the Christmas tree is a religious symbol, it is not a very strong one, and certainly not a provocatively Christian one.

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114. *Id.* at 617.

115. *Id.* at 633.

116. *Id.* at 639.

117. *Id.* at 639-640:

> The notion that the Christmas tree is necessarily secular is, indeed, so shaky that, despite superficial acceptance of the idea, Justice O'Connor does not really take it seriously. While conceding that the "menorah standing alone at city hall may well send" a message of endorsement of the Jewish faith, she nevertheless concludes: "By accompanying its display of a Christmas tree — a secular symbol of the Christmas holiday season — with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season." But the "pluralism" to which Justice O'Connor refers is *religious* pluralism, and the "freedom of belief" she emphasizes is freedom of *religious* belief. The display of the tree and the menorah will symbolize such pluralism and freedom only if more than one religion is represented; if only Judaism is represented, the scene is about Judaism, not about pluralism. Thus, the pluralistic message Justice O'Connor stresses *depends on* the tree's possessing some religious significance. *Id.* (citations omitted).

118. COMPTON'S LIVING ENCYCLOPEDIA, "*Christmas: Trees and Decorations*," via American On Line, Keyword: Compton's Encyclopedia.

For these reasons, we would have to reject Justice Brennan's outlook on the tree. And if his analysis is correct, and Justice O'Connor's use of the tree presupposes an understanding of its religiosity despite her overt statements to the contrary, then we must reject her perspective as well. Justice Blackmun, then, seems to have the most valid understanding of the Christmas tree. If it is not wholly secular, it is of generic and minimal religiosity at most.

What matters to us here is not to ascertain the status of the Christmas tree. Rather, we wish to draw attention to the fact that the justices engaged themselves to determine whether the use of the tree constitutes a central religious practice. As *Allegheny County* illustrates, the Supreme Court Justices have established clear precedent for evaluating the religious significance of individual beliefs, despite their disingenuous protestations to the contrary in *Smith*. At least one author has concluded that whatever the excuses offered in *Smith*, "the examination of the 'centrality' of a religious belief in determining whether religious exercise is 'substantially burdened' will likely have to be made by judges under RFRA."[119] The proposed limiting principle suggests only that this endeavor be accepted more consistently and more forthrightly.

C. DEMANDS ON THE SELF ARE BETTER PROTECTED THAN THOSE ON OTHERS

1. *Rationale*

The definition of religion as discussed above entails that religion is an affair of the individual. The professed beliefs of an individual will often make demands so that he or she will be "right with God." The price of fulfilling these demands range from the minimal, involving no more than occasional inconvenience, to the genuinely costly in terms of either money or life and career opportunities.

Within a pluralistic society, it seems imminently reasonable to require that the costs of fulfilling religious demands be borne entirely by the individual seeking to thereby procure divine favor for him- or herself. Citizens should not be unwillingly[120] conscripted into the salvation projects

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119. Jaasma, *supra* note 30, at 286. Professor McConnell also expresses confidence in the ability of the judicial bench to make the relevant centrality discriminations without unduly "second-guessing religious doctrine." McConnell, *Free Exercise Revisionism, supra* note 12, at 1144.

120. "Unwilling" is a pivotal qualification. There is a sense in which members who join a religious organization should not later complain if they find decisions or actions within that organization to be disagreeable or disadvantageous personally. The Supreme Court acknowledged this limitation when it observed that "All who unite themselves to such a[n

of others. The First Amendment, therefore, should not protect practices which impose costs or curtail liberties of someone other than the believer. "Religion might influence how people behaved in all areas of their lives. But what they did in the name of God had no claims upon their neighbor's conscience."[121]

Should I as a legitimate creditor go without repayment so you can tithe your church?[122] Should an inmate be allowed to place at risk an entire correctional facility because his religious beliefs prevent him from taking a standard test for tuberculosis?[123] Should children be required to listen to Christian proselytizing over the school loudspeaker?[124] Can an employer

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ecclesiastical] body do so with an implied consent to this government, and are bound to submit to it." Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871); *see* McConnell, *Free Exercise Revisionism, supra* note 12, at 1145. While such a willing adherent has given up much, I am unwilling to assume that s/he should be without any civil recourse against all actions by religious bodies.

For instance, *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), found that while religious institutions may base employment decisions upon religious preferences, they were not exempt from the 1964 Civil Rights Act proscriptions against discrimination by race, sex, or national origins, for non-ministerial positions.

121. ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 61 (1996).

122. Steven Hopkins, *Is God a Preferred Creditor? Tithing as an Avoidable Transfer in Chapter 7 Bankruptcies*, 62 U. CHI. L. REV. 1139 (1995). Hopkins believes that tithing should be a protected religious activity; the proposed limiting principle would recommend a different outcome.

123. James C. McKinley, Jr., *Isolation Ends for Prisoner Who Refused Testing for TB*, N.Y. TIMES, August 22, 1995, at B5.

124. *60 Minutes, supra* note 33; Lee v. Weisman, 505 U.S. 577 (1992).

It is the threat of wrangling captive audiences into unwelcome religious displays which lay behind the NCAA's abortive effort to prevent football players for Jerry Falwell's Liberty University from kneeling in prayer to celebrate touchdowns. At first glance, this seems like an unnecessary intrusion into spontaneous expressions of gratitude to the players' God during moments of sporting exuberance. But, as is often the case, the players freely admit that the demonstration was directed not at God, but at the spectators. The NCAA should have "stuck to its guns" and forbidden this attempt to evangelize fans.

> "Players may pray or cross themselves without drawing attention to themselves," said Vince Dooley, chairman of the NCAA football rules committee. "It is also permissible for them to kneel momentarily at the conclusion of play if, in the judgment of the official, the act is spontaneous and not in the nature of a pose.
>
> However, the "pose" is exactly what Liberty and other religious schools and individuals want. Nobody ever banned prayer from the football field — or from schools, for that matter. It is only the visible demonstration of prayer that causes problems.

require workers to attend devotional services at the workplace because he made a pledge to God to do so if his business prospered?[125] Should a school be permitted to practice racial discrimination and still receive federal funding?[126] Probably not. All of these instances buy divine salvation for the practitioner by inflicting costs and burdens on others. I reject any obligation to pay for your earthly home; so much the less should I have to subsidize your heavenly one.

This principle is, like all the others, not new to legal scholarship. James Madison's original formulation provided that "free exercise should be protected 'in every case where it does not trespass on private rights or the public peace.' This means that we are free to practice our religions so long as we do not injure others."[127] The influential Judge Learned Hand wrote that "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."[128] One of the intended exceptions to RFRA is that "the practice in question [should not] cause[] a direct, individualized harm to specifically identifiable, *non-consenting third parties*."[129]

2. *Examples*: Yang *and* Smith v. FEHC

Were this proposed limiting principle in place, it would have significantly factored into the outcome of at least two cases. The first, *Yang v. Sturner*,[130] drew some attention to itself when the judge so clearly expressed his regret that he could not rule against the state.

In this case, Rhode Island's medical examiner performed an autopsy upon the body of deceased youth. Unfortunately, he was the son of a Hmong couple, whose religious beliefs proscribe mutilation of the body. The judge originally ruled in favor of the couple in their quest for damages based in part upon their perceived violation of their Free Exercise rights, but later, in light of *Smith*, he felt that he had no choice but to rule against them.

"I want the kids across America to look at me and know that I have a higher power, and that's God," said Liberty's quarterback, Antwan Chiles. George Vecsey, *Sports of the Times; The Seasons and Symbols Butt Heads*, N.Y. TIMES, Sept. 3, 1995, §8, at 1.

125. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988).

126. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

127. McConnell, *Free Exercise Revisionism*, *supra* note 12, at 1128.

128. Otten v. Baltimore & Ohio R.R. Co., 205 F.2d 58, 61 (2nd Cir. 1953).

129. Berg, *supra* note 11, at 5 (emphasis added).

130. 728 F. Supp. 845 (D.R.I. 1990); 750 F. Supp. 558 (D.R.I. 1990).

The limiting principle would apply in this way: The record of the case specifically states that the religious beliefs were those of the *parents*, and not of the son.[131] I would interpret this to mean that the parents incurred no Free Exercise injuries by the autopsy on their son. Had the parents argued that they were pressing to respect the religious wishes of the son, rather than their own, that would make a difference. This does not mean that the parents are without any rights at all. The opinion points out that "[s]urviving kin possess a 'quasi-property' right in the body of the deceased,"[132] and injuries could be pressed under this claim. The limiting principle, however, would hold that they endured no Free Exercise violations.[133]

The second example also illustrates the limiting principle at work. In *Smith v. Fair Employment and Housing Commission*,[134] a landlord, Evelyn Smith, refused to rent to unmarried heterosexual couples because she believed that to do so would abet their acts of fornication for which God would hold her accountable. A couple denied a rental sued under the state antidiscrimination provisions which included marital status as a protected category.

The state district court found for Smith, ruling that the statute prohibiting discrimination was unconstitutional as applied to the landlord.[135] The California Supreme Court overturned this decision, finding that she could not prevail regardless of whether the *Smith* or RFRA standards were applied. The Court seems to apply reasoning akin to that suggested here: "[T]he landlord's request for an accommodation in the case before us has a serious impact on the rights and interests of third parties."[136] The involvement of others distinguished the case from the well-

131. For example, the first sentence of the original decision begins, "This sad case pits You Vang Yang and Ia Kue Yang, a couple whose deeply-held religious beliefs prohibit the mutilation of the body through an autopsy . . ." 728 F. Supp. 845, 846 (1990). Nowhere is it stated whether the dead son shared these religious beliefs.

132. *Id.* at 851.

133. Similar reasoning allows the result that while adults may withhold medical treatment from themselves, or from other like-minded adults, they +wnnot do so with minor children when such withholding results in injury or death. "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full legal discretion when they can make that choice for themselves. . . . If parents are not at liberty to 'martyr' children by taking their labor, it follows *a fortiori* that they are not at liberty to martyr children by taking their very lives." Walker v. Superior Court, 763 P.2d 852, 870 (Cal. 1988) (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).

134. 51 Cal. Rptr. 2d 700 (1996).

135. 30 Cal. Rptr. 2d 395 (Cal. App. 3 Dist. 1994).

136. 51 Cal. Rptr. 2d 700, 716 (1996).

known unemployment compensation cases, such as *Sherbert*[137] and *Thomas*,[138] where granting religious accommodation did not exact costs from identifiable third party individuals. "Indeed, the notion that an accommodation might affect the rights of third parties led the Supreme Court in *Wisconsin v. Yoder*[139] expressly to limit its holding to avoid such an implication."[140] A argument similar to Smith's was likewise rejected in Alaska.[141] Justice Thomas dissented when the United States Supreme Court denied certiorari.[142] The California case addressed the issues in the order laid out by the *Sherbert* test. That court found first that no RFRA relief was available because the burden upon her religious practice was not substantial, and thus there was no need to consider whether the state had a compelling interest in declining to exempt her from the generally applicable antidiscrimination laws. Thomas does not consider this prior issue of burden. Instead, he leaps immediately and prematurely to the "compelling interest" standard for state action. Finding that Alaska has no such level of interest in the prevention of marital status discrimination, he believed that, at the least, the Court should have heard the case, if not overturned the prior ruling.[143]

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137. Sherbert v. Verner, 374 U.S. 398 (1963).

138. Thomas v. Review Bd., 450 U.S. 707 (1981).

139. 406 U.S. 205 (1972).

140. 51 Cal. Rptr. 2d 700, 718 (1996).

141. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994).

142. Swanner v. Anchorage Equal Rights Comm'n, 115 S. Ct. 460 (1994) (Thomas, J., dissenting).

143. The implication is that there is a heirarchy of interests in preventing discrimination based upon various attributes. Race and sex discriminations are arguably more pressing states' interests than that against marital status, even if all are treated equally in civil rights legislation. The distinction rests upon the history of actual discriminatory practices which preceded those laws. A "compelling state interest" in preventing a discriminatory practice is therefore demonstrated by the joint facts that the practice is actually criminalized, and that a history of actual discrimination exists. While race, sex and marital status all meet the legal requirement, marital status discrimination lacks a prevalent social history, hence Justice Thomas' suggestion that it might fail to rise to the level of a compelling state interest.

This approach becomes particularly pivotal for the question of discrimination by sexual orientation. First, it could be argued that because there is no national policy or laws to discourage this practice, state or local ordinances to that effect would reflect at most that body's interest that all citizens be evaluated according only to their relevant merits. But such a general goal does not rise to the level of a "compelling interest" capable of deflecting a Free Exercise challenge. *See* Mark Kohler, *Equal Employment or Excessive Entanglement? The Application of Employment Discrimination Statutes to Religiously Affiliated Organizations*, 18 CONN. L.R. 581, 618 (1986).

Many opponents of equal rights for gays and lesbians also challenge the assertion that these people have a pervasive social experience of discrimination and economic disadvantage.

These cases demonstrate that while existing legal rules can yield similar results to that of the proposed limiting principle, they do so unreliably and with fragile outcome. The landlord should be denied not because her burden is not substantial, but because she cannot, and must not be allowed to pave her road to heaven with the lives and rights of independent fellow citizens.

D. FREE EXERCISE YIELDS TO ESTABLISHMENT CONCERNS

1. *Rationale*

The two clauses within the First Amendment pertaining to religion are tightly entwined, although the precise relationship of one to the other is controversial. For some, they are in fundamental contradiction: the accommodations required by the Free Exercise Clause are forbidden by the Establishment Clause.[144] For others, the relationship is more congenial, the one ending where the other begins.[145]

E.g., Defense of Marriage Act, Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong. 2nd Sess. 236 (1996) (Statement by Rep. Inglis). In their eyes, the failure to meet the second criterion to establish a compelling state interest would permit Free Exercise challenges to laws preventing sexual orientation discrimination (provided, of course, that the "substantial burden" proof had already been met).

For a contrary analysis, describing why anti-discrimination laws protecting gays and lesbians are probably immune from most Free Exercise challenges, see David B. Cruz, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 NYU L.R. 1176 (1994).

144. *Cf.* School Dis. of Abington Township, Pa., v. Schempp, 374 U.S. 203, 247 (1963) (Brennan, J., concurring); Texas Monthly, Inc. v. Bullock, Comptroller of Public Accounts of Texas, 489 U.S. 1, 26 (1989) (Blackmun, J., concurring); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Marshall, *supra* note 12, at 320.

145. The "free exercise principle defines the limits of the anti-establishment principle. One begins where the other ends." Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation under the Establishment Clause*, 99 YALE L. J. 1127, 1146 (1990). *But see* County of Allegheny v. ACLU, 492 U.S. 573 (1989), which suggests that the two clauses do not perfectly abut one another, instead creating a gap. "[W]e have never held that government's power to accommodate and recognize religion extends no further than the requirements of the Free Exercise Clause. To the contrary, '[t]he limits of permissible state accommodation to religion are by no means coextensive with the non-interference mandated by the Free Exercise Clause.'" *Id.* at 663 n.2 (Kennedy, J., concurring in part and dissenting in part).

According to Carl Esbeck, "the Free Exercise and Establishment Clauses must be construed as *never* in contradiction." Esbeck, *supra* note 20, at 594 (emphasis added).

So intimately are the two clauses related, that any complaint based on one can be rephrased into the other.[146] The Christmas crèche case of *Allegheny County*, for instance, was technically argued as an establishment case. However, at several points the Justices address the idea that the display could be argued to be a permissible Free Exercise accommodation.[147]

Given the dual influence of the clauses on any particular set of facts, it becomes important to decide beforehand which concerns should ordinarily "trump" the other. "The Rehnquist-Scalia wing [of the Supreme Court] subordinates the establishment clause to the free-exercise clause in an effort to accommodate the interests of religion."[148] In practice, this means that the state may risk appearing to endorse or approve religion — almost certainly mainstream Christianity — if such establishments will ease the observances of the faithful. As applied, Scalia would permit the state to preferentially exempt religious publications (and *only* religious publications) from sale taxes.[149] This frees the religious organization in their efforts at proselytization, but risks the appearance of government endorsement, approval and encouragement of that evangelism.

The prioritization of Free Exercise over Establishment explains some odd outcomes and even odder justifications for those outcomes within American jurisprudence. Consider the convenient relationship between the regulated rhythms of secular and economic life and the Christian calendar of religious observances. Outside the strictures of legal minutiae,[150] it is

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146. "The reverse side of an 'establishment' is a burden on the 'free exercise' of religion." McGowan v. Maryland, 366 U.S. 420, 578 (1961) (Douglas, J., dissenting). Professor Laycock "find[s] it implausible that a burden on religion might violate the Establishment Clause, . . . when it does not also violate the Free Exercise Clause." Laycock, *Remnants, supra* note 9, at 53. Thus, one court complained that the "plaintiffs' claim that the [zoning] code violates the Establishment Clause is merely a repackaging of the free exercise count to fit another constitutional label." Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554, 1560 (M.D. Fla. 1995).

147. *See* County of Allegheny, 492 U.S. at 601 n.51, 613 n.59. The main opinion discounts the accommodation perspective. This interpretation had been asserted by Justice Kennedy in a separate opinion. *Id.* at 663 n.2 (Kennedy, J., concurring in part and dissenting in part).

148. LEVY, *supra* note 65, at 159. *See Texas Monthly, Inc.*, 489 U.S. at 27 (Blackmun, J., concurring).

149. *See Texas Monthly, Inc.*, 489 U.S. at 29-33 (Scalia, J., dissenting).

150. "Sometimes the justices make distinctions that would glaze the minds of medieval scholastics." LEVY, *supra* note 65, at 155.

It doesn't help when the arcane distinctions being made are conveniently invoked rather than meticulously and consistently applied. For instance, when considering the Sunday Closing laws, the appellants urge the Court to consider the legislator's motives as being fundamentally religious. The laws were originally clearly so, and the modification of the

difficult for the reasonable man not to see an unfair establishment in the state's orchestrating a day of rest which coincides with the Christian Sabbath. Legally penalizing those who break it transgresses the Establishment Clause,[151] while refusing to accommodate those whose Sabbaths fall on other days and are thereby required to cease business enterprises for two days a week, one for religious, the other for legal reasons, violates the Free Exercise Clause.[152] But on both points the Supreme Court has ruled otherwise, relying on a supposed overwhelming state interest in the legislative mandate of a uniform day of rest.[153] But even if that were true, that does not explain why it needs to be Sunday.[154] Setting the day of economic rest as Tuesday[155] would achieve this alleged governmental objective of high importance without unduly favoring any religion.[156]

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surface language does little to obscure or alter this original legislative intent. But Justice Frankfurter eschews such analysis, saying that "the private and unformulated influences which may work upon legislation are not open to judicial probing." McGowan v. Maryland, 366 U.S. 420, 469 (1961) (Frankfurter, J., concurring). That would seem to leave the explicit textual language as the focus of constitutional scrutiny.

However, when that overt language clearly reveals the religious fundaments of the Sunday Closing laws, *then* Frankfurter recommends that the language be disregarded, and instead the unstated intentions of legislators be intuitively reconstructed from indirect evidence. *Id.* at 497-505. He feels that interpretation of no constitutional clause "demands logical tidiness," and it shows. *See id.* at 524.

151. Two Guys from Harrison-Allentown, Inc., v. McGinley, 366 U.S. 582 (1961).

152. *See generally* Braunfeld v. Brown 366 U.S. 599 (1961). Such exemptions are said to "impede the effective operation of the Sunday statutes, produce harmful collateral effects, and entail, itself, a not inconsiderable intrusion into matters of religious faith." McGowan v. Maryland, 366 U.S. 420, 520 (1961) (Frankfurter, J., concurring).

153. McGowan v. Maryland, 366 U.S. 420, 445 (1961). The "legislative purpose is the preservation of a traditional institution which assures to the community a time during which the mind and body are released from the demands and distractions of an increasingly mechanized and competition-driven society." *Id.* at 520 (Frankfurter, J., concurring).

154. The Court opines that as Sunday is already "a day apart from all others," and that the "cause [of that distinction] is irrelevant," and therefore its selection as the legally enforced day of rest is realistic and reasonable. *Id.* at 452.

155. Justice Frankfurter's concurring opinion in *McGowan v. Maryland*, 366 U.S. 420 (1961), refuses to consider any day other than Sunday as being a reasonable alternative. Any "such an attempt might prove as futile as the ephemeral decade of the French Republic of 1792." *Id.* at 483.

156. Laycock, *Remnants*, *supra* note 9, at 51, concedes that use of the Christian calendar is a "sensible accommodation to the Christian majority," but by the same token that use cannot be characterized as "religiously neutral." Thus those persons of other religions who seek to observe their own holy days are *"not* seeking special treatment; he is seeking an accommodation equal to that already extended to Christians." *Id.* The Jewish student should be allowed to reschedule a test given to others on Yom Kippur because the system has already seen to it that no similar tests will be required on Easter or Christmas.

The limiting principle proposed here would reverse the priority given the clauses (and thereby effectively overturn *McGowan*[157] and all its ill-considered progeny),[158] furthering our goal of restricting the range of circumstances within which Free Exercise protections must be granted, even in an environment of a broad and expansive understanding of "religion." Free Exercise accommodations should be withheld whenever their grant would raise Establishment concerns.

2. *Example*: Lee v. Weisman

One case which straddles the line between Free Exercise and Establishment is that of *Lee v. Weisman*.[159] A young girl sued to prevent the inclusion of prayers during her high school commencement ceremony.[160] The Supreme Court agreed that such rituals are inappropriate, at least as structured in that case, that is, with the prayer being initiated, and the clergy chosen by school officials who also offered guidelines on prayer content.[161] The primary injury is the "indirect" or psychological coercion which will exert pressure upon nonbelieving students to comply with the

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Justice Brennan, in his separate opinion to *Allegheny County*, 492 U.S. 573 (1989), disputes the characterization of December as a holiday season for Judaism. In fact, the preponderance of the Christian calendar has elevated a relatively minor Jewish holiday, Chanukah, to one of singular importance in the United States, illustrating the religious hegemony of the Christian majority actually reshaping minorities' religions to better conform to its own expectations and needs. *Id.* at 645.

157. 366 U.S. 420 (1961).

158. Choper would preserve the mandatory Sunday closing laws. CHOPER, SECURING RELIGIOUS LIBERTY, *supra* note 19, at 36. It seems a shame that someone who obviously strives so hard to arrive at the right outcome should be so consistently wrong. Choper describes his initial reaction to the challenges to the Sunday Closing laws as being a violation of the Religion Clauses. His considered reflection, however, forced him to change his mind, and instead to favor them. *Id.* at xii. He would also overturn (1) the *Sherbert* unemployment-compensation case, which held that a person could not be denied unemployment when she loses her job for religious reasons. *Id.* at 126; (2) the draft exemptions for religious objectors discussed by the *Seeger* and *Welsh* decisions. *Id.* at 129-31; and (3) those decisions such as *Edwards v. Aguillard*, 482 U.S. 578 (1987), which forbade the required teaching of creation science. *Id.* at 146. In some cases he regrets these necessary outcomes, *id.* at 189-190, but he does not view them as indicating a flaw within his reasoning, as perhaps he should.

159. 112 S. Ct. 2649 (1992).

160. *Id.*

161. If some of these actions are genuinely performed by the students themselves, it may change the outcome somewhat. *See* Stephen B. Pershing, *Graduation Prayer after* Lee v. Weisman: *A Cautionary Tale*, 46 MERCER L. REV. 1097, 1120 (1995).

prayer rituals so as to avoid unpleasant social consequences from their peers.[162]

The *Lee* majority, which did not include either Scalia or Rehnquist, explicitly rejects the reasoning that accommodating Free Exercise should supersede Establishment limitations.[163] They frame the problem thusly: "What to most believers may seem nothing more than a reasonable request is that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[164]

The limiting principle would not alter the outcome in this case. Rather, it would tighten its reasoning. For instance, Scalia, in his dissent, objects to the diffuse concept of "psychological coercion."[165] While I believe that the label refers to a genuine phenomenon, it is also clear that its introduction opens the door to a host of other problems.[166] If commencement prayers could be blocked without its use, the final opinion would be all the stronger.

The limiting principle provides such an alternative ground to justify — and almost as importantly, to routinize — the outcome of *Lee*. The reliance upon psychological coercion can have undesirable implications. For instance, if prayers are forbidden because of the emotional burdens they place on nonparticipants, then perhaps they would be acceptable if no such nonparticipants were present. The limiting principle reinterprets the facts so that the use of commencement prayers at public school ceremonies is *always* wrong, even if one hundred percent of those attending desire them.

Relatedly, psychological coercion arises unpredictably and entirely idiosyncratically depending upon who happens to be in the audience. The limiting principle would allow one to reason *a priori* what actions would bring constitutional censure. Any increase in clarity should be deemed a good thing.

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162. *Lee*, 505 U.S. at 591-95.

163. *Id.* at 587.

164. *Id.* at 592 (Kennedy, J., concurring in judgment in part and dissenting in part).

165. *Id.* at 636-37 (Scalia, J., dissenting).

166. For instance, at what point does emotional discomfort become coercion? How are false claims based upon personal expedience to be differentiated from genuine claims arising from mental distress? How can one ascertain that the negative emotional reaction is truly generated by the contested actions, and that they are not merely being displaced upon them from their original and wholly different source?

E. NEW REGULATIONS ARE MORE VULNERABLE THAN OLDER ONES

1. *Rationale*

The fifth and last limiting principle is both the most difficult to articulate and the weakest of the lot. Yet it touches on a distinction which common sense suggests should make a difference when Free Exercise claims are asserted.

The principle can be illustrated by a brief consideration of a recently decided case, *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah.*[167] A Santeria congregation planned to open a facility within the city limits of Hialeah, Florida. A central feature of this Afro-Cuban religion is animal sacrifice. The city council reacted to this news by passing ordinances which effectively outlawed animal sacrifice, exempting every other kind of animal slaughter other than that practiced by Santeria. The Supreme Court correctly ruled that these actions constituted an unusually blatant governmental effort to impede the free exercise of religion without a compensating secular interest.

In the actual case facts, the offending ordinances were passed *after* the congregation made commitments to operate within the city. This temporal sequence contributed to their vulnerability to constitutional challenge. But what if the ordinances preceded the decision to relocate? It would certainly have been that much more difficult to demonstrate that they were primarily designed to restrict Santeria worship, since there was none. This difference seems as though it should make a difference, although not necessarily a determinative one. In the first case, the laws are reactive to religious activities; in the second case, the same laws precede the religious activities, and hence should be somewhat less offensive constitutionally.

In at least one other context, laws governing recognized marriages, a similar principle to that proposed here is already operative. "[T]here is an obvious difference between a couple that recently married outside the state in order to evade its marriage restrictions and a couple that moved into the state after living together for twenty years in a place that recognized their union."[168] Although both couples have legal marriages in the eyes of State B, the question is, should these marriages be recognized by State A in disregard to its own laws?

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167. 508 U.S. 520, 525-26 (1993).

168. LARRY KRAMER, HOW OTHER STATES CAN IGNORE HAWAII, IN SAME-SEX MARRIAGE: PRO AND CON: A READER 329, 332 (Andrew Sullivan ed. 1997).

The first couple displayed a bad faith attempt to circumvent the laws of State A, their legal residence. The second couple contracted a legal marriage in State B, which they intended to be their permanent legal residence, but after twenty years, the accidents of life find them now residing in State A, where the marriage is illegal. The intents of the two couples differ, and this should make a difference in the decision by State A about what to do with these illegitimate (by its standards) marriages. In most cases, it does make a difference; marriages of the first type are much less likely to be recognized by State A than those of the second type.

Perhaps this bad faith/good faith distinction better captures the criterion for this fifth limiting principle. Entrenched (good faith) religious practices should be at least somewhat protected from arbitrary or unavoidable changes in the legal environment. On the other hand, religious persons and entities should not have unrestrained freedom to move into any setting they choose, and then demand that it alter its established practices to accommodate the newcomers.[169] Some of these moves may be bad-faith motivated — for example, they may be designed to be deliberately provocative to the established social order — and if so, they should be turned aside.

2. *Example: Zoning Cases*

The proposed limiting principle would be particularly useful in making sense out of the plethora of zoning cases. In the sample surveyed for this essay, none of them presented the circumstances which would have strongly favored a Free Exercise claim: An ensconced church with a history of relevant activities, is suddenly faced with changes in the zoning ordinances which would forbid these historical practices. Instead, they all involve churches who wished to introduce new activities into areas with established zoning ordinances which conflicted with their intended uses. Should a church have unrestricted license, for example, to move into a residential area and open a homeless shelter or a drug rehabilitation clinic?

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169. The Supreme Court has, however, ruled that religious entities are to be afforded great leeway in this regard. In Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987), the Court faced a *Sherbert*-like case where sabbatarian practices conflicted with required work schedules. Hobbie's case was not weakened, it concluded, because she had converted to her Seventh-Day Adventist beliefs after the work schedule had already been established. While in this case the outcome may be satisfactory, the proposed limiting principle maintains that this variable of change should always be considered, even it is always rejected as irrelevant. Perhaps Hobbie had other grounds for disliking the schedule, and ostensibly converted her religion as a pretext for refusing to work it. Some effort should be made to eliminate this possibility.

The responses have been diverse. On the one hand, many cases play out as they should, by the standard of this limiting principle.[170] *Germantown Seventh Day Adventist v. City of Philadelphia*,[171] *First Assembly of God of Naples, Florida, Inc. v. Collier County*,[172] and *Daytona Rescue Mission, Inc. v. City of Daytona Beach*[173] fit perfectly the facts and results recommended by the limiting principle. Ordinance enactment preceded contested church activity, and no Free Exercise burden was found.[174]

However, an equal number of cases can be cited which arrive at the opposite result despite largely identical fact situations.[175] There is clearly no well-defined standard by which such cases are to be decided. The adoption of the proposed limiting principle would bring uniformity to this issue.

CONCLUSION

Smith effectively removed all protections traditionally accorded the free exercise of religion. RFRA was designed to undue the effects of this decision by presumably setting back the clock of jurisprudence back to the day before *Smith*. Even if RFRA is found to be constitutional, it will still, of itself, be ultimately ineffective, since it undoes the effects of *Smith* without addressing the confluence of issues which made a decision like *Smith* likely. The clock may be set back, but without significant changes it can be expected to run forward again in much the same manner as it did the first time. A reprise of *Smith* looms in the future.

The probable worries which necessitated *Smith* was the combination of a broad definition of religion with a generous policy of religious accommo-

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170. This would not necessarily mean that the complaints should fail against the ordinances entirely, but only that the Free Exercise prong of the complaint should fail. Many of the cases also introduce Due Process, Free Speech, and other grounds to contest the burdening zoning ordinances, and it is possible that the religious organization could still succeed on these alternative grounds.

171. No. Civ. A. 94-1633, 1994 WL 470191 at *1 (E.D. Pa. 1994).

172. 20 F. 3d 419 (11th Cir. 1994).

173. 885 F. Supp. 1554 (M.D. Fla. 1995).

174. The cases do not explicitly state that because the facts followed the specified chronological order (ordinance first, then church action), *therefore* the Free Exercise claim was weakened. This reasoning sequence, however, is the crux of the proposed limiting principle.

175. Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991); Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538 (D.C. 1994); Jesus Center v. Farmington Hills Zoning Board of Appeals, 544 N.W.2d 698 (Mich. Ct. App. 1996).

dation. While each factor is easily defensible alone, in our hugely pluralistic society their joint operation could stultify every government action.

Of the three possible ways to avoid this outcome, *Smith* represents the one which is easiest for the judiciary. It washes its hands of the matter entirely, essentially deletes the Free Exercise Clause, and throws the matter of accommodation over to the legislature. An alternative solution, however, is one which systematically limits the reach of Free Exercise exemptions without compromising either our evolved understanding of "religion" or our traditional interpretation of the constitution. Such an approach encourages the crafting of limiting principles which would restrict the present ubiquity of Free Exercise claims. While these principles would deny Free Exercise protections to some, they would do so in a rational and even-handed way, and only to the extent necessary to trim back the universe of potential claims so that the core intent — discarded under *Smith* — can be preserved.

All of the five proposed principles have roots in standing legal theory. The primary job herein has been to isolate them and elevate them into explicit guidelines. In some instances their use would significantly alter current legal opinions; in others, the outcomes would be the same but the path to those ends would become better reasoned.

The five proposed principles to limit Free Exercise protections are: (1) Individuals are better protected than groups; (2) Central beliefs and activities are better protected than peripheral, derivative, or subsidiary beliefs and activities; (3) Beliefs and actions which place demands on the believer him- or herself are better protected than those which place the demands on other persons; (4) Free Exercise accommodations are to be withheld if their grant would raise Establishment concerns; and (5) When religious activities clash with external conditions, the temporally prior state takes precedence.

The Free Exercise Clause would thereby offer its strongest protections to personal, central beliefs and actions about personal conduct whose accommodation does not raise Establishment issues, and which are threatened by new governmental dictates. Least protected would be group peripheral beliefs and actions which impose demands upon unwilling others, whose accommodation raises Establishment issues, where the conflict arises because of knowingly moving from a context which did not present this tension into one that did.

These principles would function to limit Free Exercise claims by acting as a bar at the threshold. If the facts implicate any of them, the courts are free to dispense with any further adjudication. Even when hearings are necessary to ascertain certain issues (*e.g.*, is the belief central, is the Establishment Clause implicated), they outline which questions should be asked, and remove doubt as to the correct outcome should the facts be found

to fit into the described principles. The net outcome will be to restrict significantly, as compared to the pre-*Smith*/present RFRA environment, both the total number of potential Free Exercise claims and the amount of court time that is needed to deliberate on many others. The principled scaling back should soothe somewhat the *Smith* fears of Free Exercise-instigated civil anarchy, and thereby permit the full First Amendment protections to be offered to those cases which fall outside the shadow of the limiting principles.